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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~1131~~. ~~666~~ ~~374~~ 83

JOHN H. KINKEAD AND SAMUEL SUSSMANN,
APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 6, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

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1 In the Court of Claims.

JOHN H. KINKEAD and SAMUEL SUSSMAN
vs.
THE UNITED STATES. } No. 15659.

I.—*Petition. Filed May* 19, 1887.

To the honorable the Court of Claims:

The claimants, John H. Kinkead and Samuel Sussman, respectfully show to this honorable court—

That they, the claimants herein, were, on the 15th day of December, in the year 1868, the owners and lawfully possessed and in occupation of a certain house situated on a certain tract of land in the town of Sitka, in the Territory of Alaska, and known as building No. 1 on the official plat of said town of Sitka and described as a warehouse on the map and in the inventory "D" attached to and made a part of the protocol of the transfer of Alaska to the United States by Russia, and thereon and therein described to be private property. Being thus the owners and lawfully possessed in their own right, these claimants, on the 15th day of December, in
2 the year 1868, leased a portion of said warehouse, to wit, so much thereof as was required for warehousing bonded goods, dutiable and otherwise, to the United States, through its then collector of customs, at a rental of two hundred dollars ($200) a month. The portion of said building thus leased was immediately thereupon taken possession of and then and there used and occupied, and has been ever since held for the purpose for which it was so leased as aforesaid or for other purposes by the United States continuously from said 15th day of December, 1868, at which date it was so leased as aforesaid, down to the present time, and it is still in use by the United States, who still hold and possess the same. The use of said portion of said building so leased was fairly and reasonably worth the said monthly rental of two hundred dollars ($200) a month, at which rate it was so leased as aforesaid, and rent at that rate or sum is now justly due by the United States to these claimants from said 15th day of December, 1868, to the date this claim will probably be settled, to wit, about the 15th day of December, 1888, being a period of about twenty years, amounting to the sum of forty-eight thousand dollars ($48,000), and no portion of said amount has ever been paid up to the time of filing this petition, and for which sum these claimants now ask judgment and payment.

Thereafter, to wit, on the 12th day of September, in the year 1869, the remaining portion of this same building, not so rented as aforesaid, and as described in the foregoing portion of this petition, which was then and there owned and lawfully possessed by these claimants, was seized and taken military possession of for the use and benefit of the United States by Brevet Major General Jefferson C. Davis, United States Army, then and there commanding the United
3 States forces in Alaska, and the United States then and there used the same, and the United States have ever since held

and occupied the same continuously from the said 12th day of September, 1869, down to the present date, and the United States do still hold and possess the same; and the rent of said remaining portion of said building so seized as aforesaid was fairly and reasonably worth the monthly rental of three hundred dollars ($300), and no portion of said last-named amount has ever been paid up to the time of filing this petition. Wherefore there is now due by the United States to these claimants on account of said seizure and possession the sum of three hundred dollars ($300) a month from said 12th day of September, 1869, to the date this claim will probably be settled, to wit, the 15th day of December, 1888, a period of nineteen years and three months, amounting to the sum of sixty-nine thousand three hundred dollars ($69,300), and for which last-named sum these claimants also now ask judgment and payment.

This claim was presented by these claimants to the Secretary of the Treasury and by him not allowed, and the claimants have, at numerous times, demanded the return of said buildings to them or compensation for the same, but without success. Thereafter these claimants presented their petition to this court claiming rent for said building, and their said petition was by this court on the 11th of June, 1883, dismissed for want of jurisdiction, on the ground that as the title set up and alleged by these claimants depended upon the construction of the treaty between the United States and the Czar of Russia ceding Russian America to the United States, this court was without jurisdiction over the same by the provisions of section 1066 of the Revised Statutes of the United States. Thereafter these
4 claimants petitioned and applied to Congress for full payment of all of said rents, and also for full indemnity for the whole of their said building, and they requested that this court be invested by special act with the requisite jurisdiction to fully hear and finally determine their claims in all these premises, with the result that on the 17th day of January, in the year 1887, there was approved an act of Congress in the words and figures following, to wit:

An act referring to the Court of Claims for adjudication the claims of John H. Kinkead, Samuel Sussman, and Charles O. Wood.

Whereas John K. Kinkead, of Nevada, and Samuel Sussman, of California, did, on the twenty-eighth day of October, eighteen hundred and sixty-eight, purchase a certain building situate on lot known as number one on the official plat of the town of Sitka, in the Territory of Alaska, from the Russian-American Company, the owner of said building; and

Whereas said building had been declared by the protocol of the transfer of Russian America to the United States to be private property; and

Whereas thereafter the collector of customs of the United States did take from said Kinkead and Sussman a lease of a portion of said building and entered thereupon; and

Whereas afterward General Jefferson C. Davis did seize the whole of said building on the ground that the same was the property of

the United States, notwithstanding the commissioners appointed to ascertain private property had certified the same to be private property; and

Whereas afterward said Kinkead and Sussman did present their petition to the United States Court of Claims, claiming rent for the said building; and

Whereas said court did, on the eleventh day of June, eighteen hundred and eighty-three, dismiss said claim for want of jurisdiction only; and

Whereas Charles O. Wood, of Ohio, did in like manner purchase a certain other building, situate on lot known as number
5 twenty-four, from said Russian-American Company, and did in like manner present his petition to the Court of Claims for rent of the same, the same having been in like manner seized for the use of the United States, notwithstanding the same had been certified to be private property; and

Whereas said Court of Claims did in like manner dismiss the claim of said Wood for want of jurisdiction only: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred on the Court of Claims to hear the claims of John H. Kinkead and Samuel Sussman and Charles O. Wood for the rent and value of certain buildings in the town of Sitka, in the Territory of Alaska, alleged by them to have been acquired by virtue of purchase from the Russian-American Company, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said buildings respectively alleged to have been purchased by them, said court shall award to said parties a fair and reasonable rent for the use of the said buildings for the time (if any) the same have been occupied by the United States, and also a suitable indemnity for said buildings themselves; and the receipt of such rent and indemnity shall thereafter bar any further claim by said parties for the use of said buildings or for the value thereof; and before receiving the same all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property; and any defence, set-off, or counter-claim may be pleaded by the United States as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

Approved January 17, 1887.

The value of said building at the time it was so partially
6 rented and so seized and so forcibly taken possession of as aforesaid was the sum of fifty thousand dollars ($50,000), which last-named amount these claimants now claim, and for which they now ask judgment and payment. These claimants are ready and willing at any time to execute and deliver to any officer or officers of the United States a deed such as is required by the act of Congress above set forth.

No other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

The claimants are the sole owners of this claim and the only persons interested therein, and no assignment or transfer of this claim or of any part thereof or interest therein has been made.

The claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The claimants are citizens of the United States and have at all times borne true allegiance to the Government thereof, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, and the claimants believe the facts as stated in this petition to be true, and the claimants demand judgment for one hundred and sixty-seven thousand dollars ($167,000).

JOHN MULLAN,
GEORGE A. KING,
Attorneys for Claimants.

STATE OF NEVADA, }
County of Douglass, } ss:

John H. Kinkead, being duly sworn, deposes and says: I am one of the claimants in this case. I have read the above petition, and the matters therein stated are true, to the best of my knowledge and belief.

JOHN H. KINKEAD.

7 Subscribed and sworn to before me this 7th day of May, 1887.
[SEAL.] W. D. BROOKS,
Clerk of the District Court of the State of Nevada,
By S. A. KINSEY,
Deputy Clerk.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

Samuel Sussman, being duly sworn, deposes and says: I am one of the claimants in this case. I have read the above petition, and the matters stated therein are true, to the best of my knowledge and belief.

SAM'L SUSSMAN.

Subscribed and sworn to before me this 3d day of May, 1887.
[SEAL.] GEO. T. KNOX,
Notary Public.

8 II.—*Traverse. Filed July* 8, 1887.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant- herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimants have at all times borne true faith and allegiance to the

Government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

ROBERT A. HOWARD,
Ass't Att'y General.

9 III.—*Argument and Submission of Case.*

At a Court of Claims held in the city of Washington on the 12th and 13th days of February, A. D. 1889—

In the cause aforesaid, Mr. Geo. A. King made the opening argument for the claimants. Mr. Cochran was heard for the defendants, to which Mr. King replied, and the case was submitted.

10 IV.—*Findings of Fact and Conclusion of Law. Filed May 13, 1889.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

At the time Alaska was ceded by Russia to the United States there was standing on a certain lot adjacent to the public wharf in the town of Sitka a building, constructed of hewn logs, 118 feet in length and 50 feet in width. The land upon which this building stood belonged to Russia, and was thus embraced in the cession to the United States.

This building was erected in 1845 by the Russian-American Company, at their own expense, and from that time to the date of the treaty had been used by said company as a warehouse for the storage of furs and other property and for trading purposes.

By what authority from Russia this land was built upon and occupied by said company, further than is shown in finding II, does not appear.

II.

In fulfillment of the fourth article of the treaty the President appointed General Rousseau a commissioner to receive the formal transfer of the ceded territory, with the following instructions:

DEPARTMENT OF STATE,
WASHINGTON, *August* 7, 1867.

GENERAL: You will herewith receive the warrant of the President, under the great seal of the United States, appointing you commissioner on behalf of the Government to receive from a similar officer appointed on behalf of the imperial government of Russia the territory ceded by that government to the United States pursuant to the treaty of the 30th of March last. You will consequently enter

into communication with Captain Pestchouroff, the Russian commissioner, now here, and arrange with him in regard to proceeding, as soon as may be convenient, to the territory referred to in order that your commission may be fulfilled.

On arriving at Sitka, the principal town in the ceded territory, you will receive from the Russian commissioner the formal transfer of that territory, under mutual national salutes from artillery, in which the United States will take the lead.

Pursuant to the stipulations of the treaty that transfer will include all forts and military posts and public buildings, such as the governor's house and those used for government purposes, dockyards, barracks, hospitals, and schools, all public lands, and all ungranted lots of ground at Sitka and Kodiak. Private dwellings and warehouses, blacksmiths', joiners', coopers', tanners', and other similar shops, ice-houses, flour and saw mills, and any small barracks on the island are subject to the control of their owners and are not to be included in the transfer to the United States.

The respective commissioners, after distinguishing between the property to be transferred to the United States and that to be
11 retained by individuals, will draw up and sign full inventories of the same in duplicate. In order, however, that the said individual proprietors may retain their property as aforesaid or, if they should so prefer, may dispose of the same you will, upon the production of the proper documentary or other proof of ownership, furnish the said proprietors with a certificate of their right to hold the same.

In accordance with the stipulations of the treaty the churches and chapels in the ceded territory will continue to be the property of the members of the Greco-Russian Church. Any houses and lots which may have been granted to those churches will also remain their property.

As it is understood that the Russian-American Company possess in that quarter large stores of furs, provisions, and other goods now at Sitka, Kodiak, and elsewhere on the mainland and on the island, it is proper that that company should have a reasonable time to collect, sell, or export that property. For that purpose the company may leave in the territory an agent or agents for the purpose of closing their business. No taxes will be levied on the property of the company now in the territory until Congress shall otherwise direct.

It is expected that, in the transaction of the important business hereby intrusted to you, it will be borne in mind that, in making the cession of the territory referred to, his imperial majesty the emperor of all the Russias has been actuated by a desire of giving a signal proof of that friendship for the United States which has characterized his own reign and that of his illustrious predecessors. It is hoped, therefore, that all your intercourse with the Russian commissioner will be friendly, courteous, and frank.

This Department understands from the President that, upon the conclusion of the business with the Russian commissioner, you will

have command in the territory, to be exercised under the orders of the War Department.

I am, General, your obedient servant,

WILLIAM H. SEWARD.

Brigadier General Lovell H. Rousseau.

The commissioner, having performed his duty, made a report to the Government, the receipt of which was acknowledged as follows:

DEPARTMENT OF STATE,

WASHINGTON, *January* 24, 1868.

GENERAL: I have had the honor to receive the report which, on the 5th of December last, you transmitted to me of the execution of the agency confided to you for receiving the formal transfer of the Territory of Alaska.

The report was accompanied by a certificate mutually executed and delivered on the 26th of October last between yourself and Alexis Pestchouroff, Russian commissioner; an inventory of the property belonging to the Greco-Russian Church at Sitka; a list of the names of persons holding property in fee simple in the city of Sitka; an inventory of private property in the city of Sitka; an inventory of forts and public buildings in the Island of Kodiak; a letter of the Russian commissioner to yourself, written on the 26th of October; a map of the city of Sitka, and the United States flag which was used by you on the occasion of the transfer.

The proceedings referred to have been submitted to the President, and I am directed to acknowledge the reception of the papers and to communicate to you the President's satisfaction with the manner in which your important and delicate trust was executed.

I have the honor to be, General, your obedient servant,

WILLIAM H. SEWARD,

Secretary of State.

Major General Lovell H. Rosseau, headquarters department of the Columbia, Portland, Oregon.

Extracts from the Report of General Rousseau, the Commissioner.

Captain Pestchouroff, the governor, and myself, on the Monday following, went to work to distinguish between the public and private buildings in the town of New Archangel (Sitka), and giving certificates to private individual owners of property there.

I found that by the charter of the Russian-American Company it had authority to vest in its employés, occupants of land in the territory, the title thereto. This was on condition, however, that the possessions of the Indians should not be interfered with.

12 Acting under this charter, the company from the first caused dwellings to be erected for the use of its employés on lots of ground set apart for that purpose. The title in fee to such premises was often vested in the employé in possession when he had faithfully served out his term with the company, or, having

died before it ended and having a widow or children in the territory, the title was frequently vested in them.

Finding in its charter this authority of the company to vest title to land in its employés, and that very many of the dwellings erected by the company were occupied by its employés or their widows and children, who claimed the property in fee, the commissioners called on the governor, Prince Maksontoff, to define and certify to the interest of each individual thus occupying such dwellings and lots, in order that we might distinguish between those who owned the property in fee and those who claimed a less interest, and in compliance with your instructions give certificates to the claimants accordingly.

The inventories respectively marked C and D (forming part of the protocol), which are forwarded with this report, will show in part the action of the governor in the premises. For the rest he gave a certificate stating the interest of each occupant in the premises occupied, on the back of which the commissioners placed their approval, and it was left to be delivered to the occupant.

In order to be accurate and to prevent disputes hereafter about the title to houses and lots we made a map of New Archangel (forwarded with this report), on which every house and dwelling in the town is located and numbered, and as between the claimant and the United States the title to it defined and settled in the inventories. This was thought necessary in order to give, in accordance with your instructions, to each man of property who desired to dispose of it a certificate of title.

The town of New Archangel was built in the main by the Russian-American Company, and, except the dwellings transferred by them to their employés and the public buildings transferred to the United States, is owned by that company still; yet it has but a possessory interest in the land, as it only had permission to erect buildings upon it; for, although it had authority to vest the title of lands in its employés, it had no power to vest such title in itself. The commissioners left the matter as they found it and the company in possession of its buildings.

All the buildings in anywise used for public purposes were delivered to the United States commissioner, taken possession of, and turned over to General Davis, as were also the public archives of the territory, and in a spirit of liberality the wharf and several valuable warehouses belonging to the Russian-American Company were included in the transfer by the Russian commissioner. Both the wharf and the warehouses were very much needed by our people.

For the further action of the commissioners in the execution of their commission your attention is respectfully called to the protocol, map, and inventories accompanying this report.

Protocol of the Commissioners.

NEW ARCHANGEL, SITKA, *October* 26 (14–26), 1867.

We, the undersigned, United States and Russian commissioners, Captain Alexis Pestchouroff, of the imperial Russian navy, ap-

pointed by his imperial majesty the Emperor of Russia to transfer and deliver, and Brigadier General Lovell H. Rousseau, of the United States Army, appointed by Andrew Johnson, President of the United States, to receive, the territory ceded by his imperial majesty to the United States of America by treaty, bearing date the thirtieth day (18–30) of March, A. D. eighteen hundred and sixty-seven, met at the town of New Archangel, in the territory above named, to fulfill our commission, and on the eighteenth (6–18) day of October, in the year eighteen hundred and sixty-seven, at the governor's house in that town, Captain Pestchouroff, as such commissioner, for and in the name of his imperial majesty the Emperor of Russia, formally transferred and delivered to Lovell H. Rousseau, as commissioner as aforesaid, who received the same for and on behalf of the United States, the territory, dominion, property, dependencies, and appurtenances ceded to the United States of America by the treaty above referred to and as bounded and described in that treaty. The transfer was made under mutual salutes of artillery, the United States taking the lead, and in strict accordance with our instructions in that behalf.

In pursuance of our respective instructions Captain Pestchouroff, as such commissioner, also delivered to General Rousseau, as commissioner aforesaid, the government archives, papers, and documents relating to the territory and dominion above named; also the forts and public buildings, including the governor's house, dock-yards, block-houses, barracks, batteries, hospital, wharves, and schools in the town of New Archangel, an inventory of which, marked A, is attached hereto as part hereof. We left, as instructed, in the hands of the Greco-Russian Church the church buildings,
13 appurtenances, and parsonages to the same belonging, as shown and described in inventory marked B, attached hereto as part hereof. We gave certificates of ownership to the individual owners of private houses and of lots in fee simple in the town of New Archangel, as directed, a list of whose names is presented in inventory marked C, attached to and made part hereof. In inventory marked D, attached to and made part hereof, are shown the houses and buildings owned by private individuals in New Archangel, the owners thereof having no title in fee to the land on which they are situated. A map of the town of New Archangel is also attached as part hereof. The letters and numbers on the margins of the several inventories aforesaid correspond with those of the said plan of the town.

As we were unable to visit Kodiak personally, we took no action touching affairs there. The public property there is certified to by the governor of this territory in inventory E, attached and made part hereof, and the military authorities can take possession of the same at any time.

LOVELL H. ROUSSEAU,
United States Commissioner.
ALEXIS PESTCHOUROFF,
Russian Commissioner.

The property in dispute in this suit is not included in inventory C, where are found the names of owners to whom the commissioners gave certificates of title, but in inventory D, which is a list of buildings, "the owners thereof having no title in fee to the land on which they are situated."

III.

After said transfer William S. Dodge was appointed collector of customs at Sitka, and in June or July, 1868, he was in the possession and occupancy of the northern part of the building described in the claimants' petition, which he used as a customs warehouse. At the same time and afterwards the claimant Sussman was in the occupancy of another part of the building.

Said Dodge continued so to occupy the northern part of the building until about the 1st of December, 1868, when he turned it over to Hiram Ketchum, Jr., his successor in the office of collector, who continued in the same occupancy till March 4, 1869, when he resigned the office and turned the warehouse over to Samuel Falconer, the deputy collector of the port.

IV.

Before and after the said last-named date General Jefferson C. Davis, U. S. Army, was at Sitka in command of the department of Alaska.

On the 26th of February, 1869, there was sent to him from the War Department the following order:

It having been reported to this Department that a very large portion of the property which belonged to the Russian Fur Company in Alaska is now enjoyed by persons claiming title under a purchase from Prince Maksoutoff since the cession of that territory to the United States, the Secretary of War directs that you take possession of and retain in your charge all posts, buildings, etc., which are not in fact entitled to be considered individual property.

In pursuance of this order General Davis, on the 2d of June, 1869, authorized the said Falconer to take possession of and use the whole of said building for Government purposes pertaining to the Treasury Department, except the three lower rooms of it situated on
14 the southeast side of the lower passage-way, which rooms were reserved by General Davis for the storage of army stores, and were, in the month of September following, placed under the control of the quartermaster's department of the army.

From that time to the present the whole of said building has remained in the possession and use of the Government, said Falconer continuing in the occupancy of the part of it so assigned to him until August, 1869, when he turned it to over to William Kapus, who had been appointed collector of the port.

It does not appear that either Dodge, Ketchum, Falconer, or Kapus was authorized by the Secretary of the Treasury to rent the premises so occupied by them respectively, or that either of them ever paid rent therefor to any one.

V.

On the 2d of June, 1869, the claimant Kinkead, styling himself "attorney for the owners," protested in writing to General Davis against his action in taking possession of said building. In his protest he claimed that the building had been designated as private property by the commissioners appointed by the government of Russia and that of the United States; that it had been purchased of Prince Maksoutoff, chief factor of the late Russian-American Company, and that the title acquired through that purchase was good, valid, and legal. The title thus set up was what purported to be conveyed by a deed to Louis Sloss, dated October 28, 1868, but though the deed was made to him the claimants assert, and he admits, that the beneficial interest in the conveyance is in them. The deed was as follows:

This indenture, made the twenty-eighth day of October, in the year of our Lord one thousand eight hundred and sixty-eight, between the Russian-American Company, party of the first part, and Louis Sloss, of San Francisco, in the State of California, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of three thousand dollars, gold coin of the United States, to them in hand paid by the said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the second part, his heirs, executors, and administrators, forever released and discharged therefrom, by these presents have granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part and to his heirs and assigns forever all that certain piece or parcel of land situate, lying, and being in the city of Sitka and territory aforesaid, and more particularly described as that piece or parcel of land situate near and adjoining to the public wharf of said city upon which is erected building numbered one (No. 1), and described as a warehouse in the map and inventory D attached to and made a part of the protocol of the transfer of said territory to the United States by Russia and therein declared to be private property.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

And also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to the said premises and every part and parcel thereof, with the appurtenances:

To have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever; and the said party of the first part does hereby covenant that they will warrant and defend their right, title, and interest of, in, and to the said premises against the acts and

deeds of the said party of the first part and all persons claiming by, from, under, or through the said party of the first part unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said party of the first part has hereunto caused its corporate seal to be affixed and these presents to be subscribed, by their chief administrator, the day and year first above written.

[Seal of the Russian-American Company.]

P. MAKSOUTOFF,
Chief Administrator of the Russian-American Company.

Signed, sealed, and delivered in the presence of—
H. T. BINGHAM.
WILLIAM S. DODGE.

Whereas John H. Kinkead, of Carson City, Nev., and Samuel Sussman, of San Francisco, Cal., did on the 28th day of October, in the year 1868, purchase from tha Russian-American Company, acting through Prince Maksutoff, their chief administrator, that certain property situated in the town of Sitka, in Alaska, known as building No. 1 and hereinafter more particularly described; and whereas said John H. Kinkead and Samuel Sussman did make payment for the same; and whereas the legal title to said property in the deed of purchase was taken in the name of Louis Sloss; and whereas said Louis Sloss did not have at that time, and never heretofore has had and has not at this time, any beneficial or equitable interest in and to said property or to any portion thereof; and whereas the said purchase was taken in the name of said Louis Sloss simply for convenience and business accommodation between the parties and not otherwise; and whereas the said Louis Sloss now holds said property merely as the trustee for said John H. Kinkead and said Samuel Sussman and not otherwise; and whereas the equitable title in and to said property ever was since October 28, 1868, and now is in the said John H. Kinkead and said Samuel Sussman and not otherwise: Therefore, for the purpose of conveying to said John H. Kinkead and said Samuel Sussman the legal title in and to said property so held by me as trustee as aforesaid:

Now, therefore, this indenture, made this 25th day of February, in the year 1887, between Louis Sloss, of the city and county of San Francisco, in the State of California, party of the first part, and John H. Kinkead, of Carson City, in the State of Nevada, and Samuel Sussman, of the city and county of San Francisco, in the State of California, parties of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of $1, lawful money of the United States, to him in hand paid by the said parties of the second part at and before the ensealing of these presents, the receipt whereof is hereby acknowledged, and the said parties of the second part, their heirs, executors, and administrators, are forever released and discharged therefrom, and also in consideration of the foregoing recitals, by these presents has granted, bargained, sold, aliened, remised, released, conveyed, and confirmed, and by these

presents does grant, bargain, sell, alien, remise, release, and confirm, unto the said parties of the second part and to their heirs and assigns forever all that certain piece or parcel of land situate, lying, and being in the city of Sitka and Territory of Alaska and more particularly described as that piece or parcel of land situated near and adjoining to the public wharf of said city upon which is erected building number one (No. 1), and described as a warehouse in the map and inventory D attached to and made a part of the protocol of the transfer of said territory to the United States by Russia and therein declared to be private property, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging *to* or in anywise appertaining, and the reversion and reversions, remainder and remainders, and all rents, past, present, or prospective, and issues and profits thereof or due in any manner or whencesoever arising, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to said premises and every part and parcel thereof, with the appurtenances; to have and to hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part, their heirs and assigns forever.

In witness whereof the said party of the first part has hereunto affixed his hand and seal the day and year first above written.

LOUIS SLOSS.

VI.

After said Ketchum received possession of the part of said building which was occupied as a customs warehouse, as above stated, the claimants demanded of him that he should either surrender the occupation of the premises or lease the same from the owners. This was the first adverse claim to the premises which appears to
16 have been made by any one on the collector of the port. Ketchum then negotiated with the claimant Sussman for the leasing of a part of the building, and the following paper was executed by him and Sussman:

This indenture, made the fifteenth day of December, in the year of our Lord one thousand eight hundred and sixty-eight, between Samuel Sussman, agent for Louis Sloss, party of the first part, and Hiram Ketchum, Junior, party of the second part, witnesseth:

That the said party of the first part has granted, demised, and let, and by these presents does grant, demise, and let, unto the said party of the second part so much of the warehouse adjoining the public wharf at the foot of Lincoln street, in the said city of Sitka, as he, the said party of the first part, shall find it necessary to occupy and use for the purpose of warehousing bonded goods, dutiable and otherwise, under the custom-and other laws of the United States, the said building being more particularly described as building numbered one (No. 1) on the map and inventory D attached to and made a part of the protocol of the transfer of the Territory of Alaska by Russia to the United States and therein declared to be

private property; to have and to hold from the fifteenth day of December, 1868, to the fifteenth day of December, 1869, at the monthly rent or sum of two hundred dollars, gold coin of the United States, payable on the fifteenth day of each and every month.

And the said party of the second part does hereby covenant, promise, and agree to pay the said party of the first part the said rent in the manner hereinbefore specified and not to let or underlet the said premises or any part thereof without the written consent of the said party of the first part or of his agent thereunto properly authorized, and that at the expiration of the said term the said party of the second part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part, for and in consideration of the premises and of the further sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby covenant and agree to and with the said party of the second part that for the period of nine (9) months next ensuing—that is to say, from and after the 15th day of December, 1868, and before the fifteenth day of September, 1869—the United States shall have the sole and exclusive right and privilege of purchasing the said premises upon the United States paying therefor the sum of twenty-two thousand five hundred dollars ($22,500), currency; and the said party of the first part does hereby covenant and agree not to sell or dispose of the said premises to any other party or parties whatsoever within the time hereinbefore specified; but should the United States not purchase the said premises before the fifteenth day of September, 1869, the said party of the first part shall then have the right to dispose of the said premises to any one whomsoever.

And it is hereby further covenanted between the said party of the first part and the said party of the second part that in the event of the sale of the said premises, subject to the foregoing covenants and conditions, then this lease to terminate from the date of such sale, and thereafter to be null and void.

And the said party of the first part does hereby further covenant, promise, and agree that the said party of the second part, paying the said rent subject to the covenants aforesaid, shall and may, peaceably and quietly, have, hold, and enjoy the said premises for the term aforesaid.

In witness whereof the said parties have hereunto set their hands and affixed their seals the day and year in this instrument first above written.

SAM'L SUSSMAN, [SEAL.]
Ag't for Louis Sloss.
HIRAM KETCHUM, JR. [SEAL.]

Signed, sealed, and delivered in the presence of—

H. T. BINGHAM.
SAMUEL FALCONER.

VII.

Ketchum transmitted a copy of said lease to the Secretary of the Treasury, who, on the 18th of February, 1869, wrote to him disapproving of the lease, advising him that no building could be hired by him for any purpose without the previous authority and assent of the Treasury Department, and referring to a letter which the Secretary had written to him on the 6th of that month, claiming that the building described in the lease was the property of the United States under the treaty of cession of Alaska.

Conclusion of Law.

Upon the foregoing finding of facts the court decides as conclusion of law that the claimants are not entitled to recover.

17 V.—*Opinion of the Court.*

SCHOFIELD, *J.*, delivered the opinion of the court:

This suit involves the ownership and value of a certain building in the town of Sitka and Territory of Alaska.

The defendants claim that the building, with the land on which it stands, was ceded to them by Russia in the treaty of March 30, 1867 (15 Stat., 539). The claimants, on the other hand, contend that the building, although standing on land embraced in the cession, was private property, belonging to the Russian-American Company, under whom they claim, and, as private property, was excepted from the cession by the express terms of the treaty.

In this suit the claimants do not seek to recover the land, although it is embraced in their deed. They claim only the value of the building and the rent, amounting to $167,000.

The case came before this Court some years ago and was then dismissed for want of jurisdiction (18 C. Cls., 504).

Thereafter Congress passed the following act:

An act referring to the Court of Claims for adjudication the claims of John A. Kinkead, Samuel Sussman, and Charles O. Wood.

Whereas John. H. Kinkead, of Nevada, and Samuel Sussman, of California, did, on the twenty-eighth day of October, eighteen hundred and sixty-eight, purchase a certain building situate on lot known as number one on the official plat of the town of Sitka, in the Territary of Alaska, from the Russian-American Company, the owner of said building; and

Whereas said building had been declared by the protocol of the transfer of Russian America to the United States to be private property; and

Whereas thereafter the collector of customs of the United States did take from said Kinkead and Sussman a lease of a portion of said building and entered thereupon; and

Whereas afterward General Jefferson C. Davis did seize the whole of said building, on the ground that the same was the property of the

United States, notwithstanding the commissioners appointed to ascertain private property had certified the same to be private property; and

Whereas afterward said Kinkead and Sussman did present their petition to the United States Court of Claims claiming rent for the said building; and

Whereas said Court did, on the eleventh day of June, eighteen hundred and eighty-three, dismiss said claim for want of jurisdiction only; and

Whereas Charles O. Wood, of Ohio, did in like manner purchase a certain other building situate on lot known as number twenty-four from said Russian-American, and did in like manner present his petition to the Court of Claims for rent of the same, the same having been in like manner seized for the use of the United States, notwithstanding the same had been certified to be private property; and

Whereas said Court of Claims did in like manner dismiss the claim of said Wood for want of jurisdiction only: Therefore

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred on the Court of Claims to hear the claims of John H. Kinkead and Samuel Sussman and Charles O. Wood for the rent and value of certain buildings in the town of Sitka, in the Territory of Alaska, alleged by them to have been acquired by virtue of purchase from the Russian-American Company, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said buildings respectively alleged to have been purchased by them, said court shall award to said parties a fair and reasonable rent for the use of the said buildings for the time (if any) the
18 same have been occupied by the United States, and also a suitable indemnity for said buildings themselves, and the receipt of such rent and indemnity shall thereafter bar any further claim by said parties for the use of said buildings or for the value thereof, and before receiving the same all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property, and any defence, set-off, or counter-claim may be pleaded by the United States as defendants as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

Approved January 17, 1887.

August 7, 1867, commissioners to make the formal transfer of the territory, as required by article 4 of the treaty, were appointed, and they made their official joint report or protocol, dated at Sitka, October 26, 1867. Accompanying this protocol was a schedule in which this building is classed as private property and described as warehouse No. 1. No owner is named.

Subsequently to these proceedings, to wit, October 28, 1868, the claimants took from the Russian-American Company a deed of the

land on which this building was standing and paid therefor $3,000 in gold, but the company did not warrant their title. At that time the United States were occupying the northern part of the building as a customs warehouse.

The building was erected by the Russian-American Company in 1845, and from that time until after the transfer to the United States by the treaty was occupied by that company. They used it for storing furs and other property and for the purpose of general trade. What agreement for the occupancy of the land that company had with the Russian government does not fully appear. The United States commissioner, in his separate report to the State Department, says:

The town of New Archangel (Sitka) was built in the main by the Russian-American Company and, except the dwellings transferred by them to their employés and the public buildings transferred to the United States, is owned by that company still. Yet it has but a possessory interest in the land, as it only had permission to erect buildings upon it, for, although it had authority to vest the title of lands in its employés, it had no power to vest such title in itself. The commissioners left the matter as they found it and the company in possession of its buildings. * * *

All the buildings in anywise useful for public purposes were delivered to the United States commissioner, taken possession of, and turned over to General Davis, as were also the public archives of the Territory, and in a spirit of liberality the wharf and several valuable warehouses belonging to the Russian-American Company were included in the transfer by the Russian commissioner. Both the wharf and the warehouses were very much needed by our people.

To decide upon the ownership of the building we must look first to the treaty itself.

By the first article the Emperor of Russia agreed to cede to the United States "all the territory and dominion now possessed by his majesty on the continent of America." It is admitted by the claimants that the land upon which the building stands belonged to his majesty and constituted a part of the territory thus ceded. That being so, and nothing more appearing, the building would be included in the cession. Confirmatory of this intention of the contracting parties the last lines of the sixth article repeat that "the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion and appurtenances thereto."

The second article provides that "in the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property."

19 Taking this article to be a limitation upon the general terms of the first, and admitting that this building would be included in the words "other edifices," it becomes necessary to inquire whether it was "private individual property" within the meaning of this article.

On the one side it is contended that all edifices not used for governmental purposes are excluded from the cession, and on the other that no edifice is excluded unless it was not only private property, but property owned by an individual as distinguished from a company.

By the claimants' construction the word "individual" has either no meaning at all or is simply a repetition in meaning of the preceding word "private." We cannot suppose that the word was used by the distinguished negotiators without a proper consideration of its normal meaning, nor that it found a place in the text by mere accident, especially as the same words are repeated in the sixth article. We infer, therefore, that "the high contracting parties" did not intend to class this edifice as "private individual property."

The sixth article seems even more clearly to support the contention of the defendants. It declares that "the cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property-holders." Here is a guaranty against any claim that "any associated companies" may set up. Having thus extinguished all claims of the Russian or other companies, the article goes still further and cuts off claims of "any parties except merely private individual property-holders." So far as this article is concerned, it is not important to inquire whether or not property held by the Russian-American Company can be classed as "private individual property," because the exception relates only to the words "any parties" in the foregoing enumeration.

To understand fully the purpose of this article the relation existing between the company and the Russian Government should not be overlooked. That company not only had a monopoly of trade and all sources of wealth in the whole of that vast territory, but exercised over it all the powers of government. The counsel for the claimants, in his written brief, says:

Not only was the American company authorized to administer the government in its own way, but it possessed the power of subletting or transferring its franchises and privileges to other parties and had exercised that authority.

While the company could and did convey land to private individuals, its employés, and others, it had for itself only the right of occupancy for the purpose of trade. At best it was only a tenant at will. All betterments and buildings placed upon the land became part of the realty, and its ownership and right of occupancy of them ceased with the termination of its tenancy. Russia was about to terminate the tenancy by transferring the territory to the United States. The company may have had some equities as against Russia, and the United States did not propose to assume them. They were willing that any party who had acquired title to land should retain it, but they did not intend that these companies should continue to occupy the ceded territory, nor did they intend to pay them for betterments.

20 To avoid all misunderstanding on that subject and all misconstruction of the first and second articles the sixth article, after some further negotiation, was inserted. Its language is positive, clear, and unmistakable. All incumbrances, whether originating in grant, privilege, or possession, in favor of these companies are entirely extinguished. Under that article these companies can no more claim buildings put upon the land for the purpose of carrying on trade during their tenancy than they can the land itself. Indeed, it is difficult to see how they could claim or enjoy the buildings without the land. The claimant's construction of the treaty gives this article no force whatever. In their view of the case it is quite unimportant.

Secretary Seward did not so regard it. He made its adoption an ultimatum. He wanted no controversy with these companies about equities arising from possession and improvement or alleged privileges. He therefore insisted that Russia should clear the territory of all such incumbrances. He even agreed to pay $200,000 to enable Russia to settle, if she saw fit, with her own outgoing tenants. This was in addition to the sum originally agreed to be paid, as appears by the following correspondence:

DEPARTMENT OF STATE,
WASHINGTON, *March* 23, 1867.

SIR: With reference to the proposed convention between our respective Governments for a cession by Russia of her American territory to the United States, I have the honor to acquaint you that I must insist upon that clause in the sixth article of the draught which declares the cession to be free and unincumbered by any reservations, privileges, franchises, grants, or possessions by any associated companies, whether corporate or incorporate, Russian or any other, etc., and must regard it as an ultimatum. With the President's approval, however, I will add two hundred thousand dollars to the consideration money on that account.

I avail myself of this occasion to offer to you a renewed assurance of my most distinguished consideration.

WILLIAM H. SEWARD,
Secretary of State.

Mr. Edward De Stoeckl, etc.

(*Translation.*)

IMPERIAL LEGATION OF RUSSIA TO THE UNITED STATES,
WASHINGTON, *March* 25, 1867.

Mr. SECRETARY OF STATE: I have had the honor to receive the note which you were pleased to address to me on the 23d March, 1867, to inform me that the Federal Government insists that the clause inserted in article sixth of the project of convention must be strictly maintained, and that the territory to be ceded to the United States must be free from any arrangement and privileges conceded either by government or by companies.

In answer I believed myself authorized, Mr. Secretary of State, to

accede literally to this request on the conditions indicated in your note.

Please accept, Mr. Secretary of State, the assurances of my very high consideration.

STOECKL.

Hon. William H. Seward, Secretary of State of the United States.

The opinion of the Attorney General (14 Opinions, 302), cited by the claimants, can hardly be said to sustain their contention. After discussing the case at considerable length the opinion concludes as follows:

But though the ownership of the buildings in dispute was left by the provisions of the treaty in the Russian-American Company, yet, as all right or interest which the company had in the land on which they were erected was extinguished and the title thereto transferred free and unincumbered to the United States, the company could not by reason of its ownership of those buildings thereafter occupy such land except by the sufferance of the Government of the United
21 States, and the parties who may have since purchased the buildings from the company would seem to stand in the same situation relatively to the Government. They are simply occupants of the public domain without title and where there is no law providing for the acquisition of title from the United States.

Even according to this opinion the Government had only to take possession and assert its paramount right to make its title complete under the treaty. This the United States had already done by taking possession of the northern part of the building and using it as a custom-house for four months at least before the date of the claimants' deed. This occupancy was notice to the claimants that the Government was claiming title.

We come now to inquire whether property acquired by the United States under the terms of the treaty has been lost by the action of the commissioners or any branch of the executive department.

The fourth article of the treaty is as follows:

His majesty the Emperor of all the Russias shall appoint, with convenient dispatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States the territory, dominion, property, dependencies, and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto; but the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratification without waiting for such formal delivery.

By this article the commissioners are merely empowered to make a formal delivery of "the territory, dominion, property, and appurtenances which are ceded as above," but not to enlarge nor diminish the cession. They had no more power to take from or add to the treaty than they had to annul it altogether. They were to go through a public traditional ceremony and make a symbolical delivery. Their duty was altogether formal.

The added words "and for doing any other act which may be

necessary in regard thereto" did not authorize them to put a construction upon the language of the treaty binding upon the parties. "Thereto" refers to the formal delivery and nothing more. That the duty imposed upon them was merely ministerial and in no sense judicial is shown by the concluding words of the article, that "the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratification without waiting for such formal delivery." Nor did the note of Secretary Seward, dated January 24, 1868, addressed to General Rousseau, upon the receipt of his report and the protocol of the commissioners, commit the Government to their construction of the treaty if they had attempted to make one. It was merely a complimentary acknowledgment of his services, and not intended to indorse any errors into which he might have fallen.

But the commissioners, in fact, decided nothing. They simply placed warehouse No. 1 in a list of buildings. "The owners thereof," so they reported, "have no title in fee to the land on which they are situated." They did not undertake to decide on the question of ownership under the treaty, and therefore gave no certificates to the alleged owners. "They left the matter as they found it and the company in possession of its buildings."

They state the facts substantially as the court has found them. The company had erected this building and were occupying it when the commissioners arrived, and they were left in possession when they departed. Whether the building should go with the land or the land with the building was a question which they left unsettled.

22 From these facts no question of estoppel can arise. The commissioners decided nothing adverse to the Government, and the Government has never released, even in appearance, any rights acquired by the treaty, but, on the contrary, has steadily asserted them.

The instructions to the commissioners and their action are significant of the intention of all parties concerned not then to decide nor express an opinion upon the title to private property affixed to the land ceded to the United States by the treaty. The commissioners were instructed to distinguish between the property to be transferred to the United States and that to be retained by individuals and to draw up inventories thereof, and were to decide upon the ownership and "furnish the said proprietors with a certificate of their right to hold the same." This they did, and included all such property in Schedule C and gave certificates to the individual proprietors. Schedule D, in which the warehouse in question is included, was not required by the instructions. The reputed owners were not named and no certificates of ownership were given. It seems to be a schedule of private property which they found on Government land, the title to which they passed no opinion upon.

The present claimants set up no title under certificates of the commissioners.

It remains to be considered, upon the construction of the law under which this suit is brought, how much of the case has been decided

by Congress and how much has been left to the decision of the court.

The preamble recites that—

Whereas John H. Kinkead, of Nevada, and Samuel Sussman, of California, did, on the twenty-eighth day of October, eighteen hundred and sixty-eight, purchase a certain building situate on lot known as number one on the official plat of the town of Sitka, in the Territory of Alaska, from the Russian-American Company, the owner of said building; and

Whereas said building had been declared by the protocol of the transfer of Russian America to the United States to be private property. * * *

The body of the act provides as follows:

That jurisdiction be, and is hereby, conferred on the Court of Claims to hear the claims of John H. Kinkead and Samuel Sussman and Charles O. Wood for the rent and value of certain buildings in the town of Sitka, in the Territory of Alaska, alleged by them to have been acquired by virtue of purchase from the Russian-American Company, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said buildings respectively alleged to have been purchased by them said court shall award to said parties a fair and reasonable rent for the use of the said buildings for the time (if any) the same have been occupied by the United States, and also a suitable indemnity for said buildings themselves. * * *

The claimant contends that Congress has here decided that the legal title to the building at the time of its purchase was still vested in the Russian-American Company, and that the court has only to pass upon the sufficiency of the conveyance from this company to themselves before proceeding to ascertain values.

As bearing upon this contention it may be proper to observe that the only question which has ever been in controversy between the parties was whether the title to the building vested in the defendants by the treaty or remained in the company. That the company owned it before the ratification of the treaty, subject to Russian supremacy, has not been denied by the defendants. No questions even about the value or rent of the buildings were discussed prior to the original suit. Through the lease to Collector Ketcham the claimants had substantially made a proposition to rent or sell, but the Secretary of the Treasury refused to consider it, because he claimed, as did the Secretary of War, that the Government had acquired title to the building by the treaty. If the question of ownership had been out of the case there is no reason to believe that an agreement for rent might not have been amicably effected, as in other cases.

It is scarcely probable that Congress intended by these five words in the preamble, somewhat parenthetically inserted, to decide the only disputed point in the case. We are therefore induced to believe that the recital of ownership referred rather to the date of the treaty than to the date of the claimant's deed. (Cummings' Case, 131 U. S. R.)

However that may be, it is quite certain the court is required to consider values only after it has found that the claimants had acquired a valid title. This, in the opinion of the court, overrules the recital of the preamble, whatever construction may otherwise be placed upon it.

The petition is dismissed.

23 VI.—*Judgment of the Court.*

JOHN H. KINKEAD and SAMUEL SUSSMAN
vs.
THE UNITED STATES. } No. 15659.

At a Court of Claims held in the city of Washington on the 13th day of May, A. D. 1889, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the claimants' petition be dismissed by the Court.

24 VII.—*Application of Claimants for an Allowance of Appeal.*

From the judgment rendered on the 13th day of May, 1889, in the above-entitled cause, in favor of the United States, the claimants, John H. Kinkead and Samuel Sussman, by their attorneys, John Mullan and George A. King, hereby on this 9th day of August, 1889, make application for and give notice of an appeal to the Supreme Court of the United States.

JOHN MULLAN,
GEORGE A. KING,
Attorneys for Claimants.

Filed August 9, 1889.

Allowed in open court December 23, 1889.

WILLIAM A. RICHARDSON,
Chief Justice.

25 In the Court of Claims.

JOHN H. KINKEAD and SAMUEL SUSSMAN
vs.
THE UNITED STATES. } No. 15659.

I certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the judgment of the court dismissing the petition, of the application of claimants for and the allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 21st day of January, A. D. 1890.

JOHN RANDOLPH,
Ass't Clerk, Court of Claims.

Endorsed on cover: Court of Claims. No. 1134. John H. Kinkead and Samuel Sussman, appellants, *vs.* The United States. Filed March 6, 1890.

FILED.
OCT 30 1893
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1893.

No. 83.

JOHN H. KINKEAD
AND
SAMUEL SUSSMAN, Appellants,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

JOHN MULLAN,
GEORGE A. KING,
JOSEPH K. McCAMMON,
Attorneys and of Counsel for Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN H. KINKEAD and SAMUEL SUSSMAN, Appellants,
vs.
THE UNITED STATES.
No. 83.

BRIEF FOR APPELLANTS.

I.

Statement of the Case.

On the 30th of March, 1867, a treaty was concluded between the United States and the Emperor of Russia. Article 1 (Public Treaties of the United States, p. 671) provides:

"His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America, and in the adjacent islands," etc.

Article 2 provided, p. 672:

"In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices

which are not private individual property. It is, however, understood and agreed, that the churches which have been built in the ceded territory by the Russian Government, shall remain the property of such members of the Greek Oriental Church resident in the territory as may choose to worship therein. Any government archives, papers, and documents relative to the territory and dominion aforesaid, which may now be existing there, will be left in the possession of the agent of the United States; but an authenticated copy of such of them as may be required, will be, at all times, given by the United States to the Russian Government, or to such Russian officers or subjects as they may apply for."

Article 3 contained provisions in regard to the inhabitants of the said territory, including a guarantee of protection "in the free enjoyment of their liberty, property, and religion."

Article 4, p. 673, provided:

"His Majesty the Emperor of all the Russias shall appoint, with convenient despatch, an agent or agents for the purpose of formally delivering to a similar agent or agents, appointed on behalf of the United States, the territory, dominion, property, dependencies, and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto. But the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery."

Article 5 provided for the delivery of military posts, and the withdrawal of Russian troops.

Article 6 fixed as the consideration of the cession, a payment by the United States to Russia of $7,200,000. It also provided as follows:

"The cession of territory and dominion herein made is declared to be free and unincumbered by any reservations, privileges, franchises, grants, or possessions, by any

associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto."

Article 7 provided for the exchange of ratifications.

The facts found by the Court of Claims appear in the Transcript of Record, pp. 8–15. They need not here be repeated.

There had been a previous suit in the Court of Claims by the claimants in the present case, John H. Kinkead and Samuel Sussman, for use and occupation of the premises from the date of their seizure, which, upon the authority of *Langford* v. *United States*, 101 U. S. 341, had been dismissed for want of jurisdiction. *Kinkead* v. *United States*, 18 C. Cls. 504.

Thereafter Congress passed the special act for the relief of the claimants, set out in the Record, pp. 2, 3.

The claimants thereupon filed in the Court of Claims their petition May 19, 1887, p. 1, claiming under the terms of the special act "a fair and reasonable rent for the use of the said buildings for the time, if any, the same have been occupied by the United States, and also a suitable indemnity for the buildings themselves."

The Court of Claims decided, however, that they were not entitled to recover, and entered judgment May 13, 1889, dismissing their petition (p. 23).

From this judgment the claimants appealed (p. 23).

II.

Assignment of Errors.

The appellants hereby assign the following errors in the rulings and judgment of the Court of Claims:

1. Said court erred in holding that the claimants were not entitled to "a fair and reasonable rent for the use of the said buildings for the time the same have been occupied by the United States," as required by the terms of the act of January 17, 1887, and in not giving a judgment for the amount of said rent.

2. Said court erred in holding that said claimants were not entitled to "also a suitable indemnity for said buildings themselves" as required by said act, and in not entering a judgment for the amount of said indemnity.

3. Said court erred in dismissing the petition of said claimants, instead of rendering judgment for the amount therein claimed.

III.

Brief of Argument.

1. The Act Referring the Claim.

As the act of January 17, 1887, referring the claim in question to the Court of Claims lies at the foundation of the right of recovery, its construction is the first question arising in the case. It opens with a preamble stating certain facts, viz.:

1. That Kinkead and Sussman, the claimants, on October 28, 1868, purchased a certain building situate on lot No. 1, on the official plat of the town of Sitka, in the Territory of Alaska, "from the Russian-American Company, *the owner of said building.*"

2. That "said building had been declared by the protocol of the transfer of Russian America to the United States to be private property."

3. That "thereafter the collector of customs of the United States did take from said Kinkead and Sussman a lease of a portion of said building and entered thereupon."

4. That "afterward General Jefferson C. Davis did seize the whole of said building on the ground that the same was the property of the United States, notwithstanding the commissioners appointed to ascertain private property had certified the same to be private property."

5. That Kinkead and Sussman had subsequently presented their petition to the Court of Claims, and that the court had on June 11, 1883, dismissed the same for want of jurisdiction only.

Other paragraphs of the preamble relate to another claim of one Charles O. Wood, likewise referred by the same act. These are not material to the present case.

Said act then proceeds to confer jurisdiction upon the Court of Claims to hear and determine the claim, and lays down a rule as to the measure of damages.

It was contended on behalf of the claimants when the case was brought before the Court of Claims "that Congress has here decided that the legal title to the building at the time of its purchase was still vested in the Russian-American Company, and that the court has only to pass upon the sufficiency of the conveyance from this company to themselves before proceeding to ascertain values." (Rec. p. 22.)

The court, however, overruled this contention and decided that the title of the Russian-American Company to the building at the time of the sale was open to contest by the United States, notwithstanding the recital of the act that the claimants "did on the 28th day of October, 1868, purchase a certain building situate on lot known as No. 1, on the official plat of the town of Sitka, in the Territory of Alaska, from the Russian-American Company, *the owner of said building.*"

This ruling, we submit, was erroneous.

Congress certainly has the right when a petition is presented to it, praying for relief on the part of any claim-

ant, to determine the facts for itself and grant the relief prayed for. It has the right to determine certain facts and refer the case to the Court of Claims for the purpose of finding certain other facts, particularly questions of value, amount, etc. Thus, in *Roberts* v. *United States*, 92 U. S. 41, where a special act provided "That the claim of the trustees of Albert G. Sloo for compensation for services in carrying the United States mails," etc. "be, and the same is hereby, referred to the Court of Claims, and the said court is hereby directed to examine the same, and determine and adjudge whether any, and if any, what amount is due said trustees for said extra service," this court held (p. 49):

"It is true that Congress did not determine, in express terms, that the parties were entitled to any compensation, but referred to the court to decide 'whether any, and if any, what amount is due.' Still we think it is plain that *Congress principally intended to refer to the adjudication of the Court of Claims the amount of compensation to which the claimants were entitled*, and for that purpose prescribed the principle by which it should be estimated; but even if it was intended to refer the whole subject, the right to compensation, as well as the amount, the claimants, under the circumstances of the case, are, in our judgment, entitled to compensation."

In *Jordan* v. *United States*, 19 C. Cls. 108, the Court of Claims had before it a special act reciting certain facts as having been established to the satisfaction of Congress, and thus considered it (pp. 118, 119):

"The act recites that the Secretary of the Treasury, under a given date, recommended the action taken by Congress, and also that the persons named, and each of them, had 'filed their claims in the office of the Commissioner of Internal Revenue prior to the 6th of June, 1873.' There is no more reason why it should be made to appear that Congress was right in assuming that the claims al-

lowed came within the terms of the Treasury circular than in assuming that the Secretary had recommended each and every one of them, and that they had all been filed with the Commissioner prior to June 6, 1873. Congress might have been mistaken in one or all these particulars, but they so enacted, and whatever is enacted, right or wrong, constitutes the law and facts of the case.

"A mistake of fact upon which the action of Congress is predicated does not control the positive enactment founded upon it. Such a mistake might be a good cause for the repeal of an act by the power which passed it, but would be no justification for a court or the executive officers to set it aside or to restrict its effect.

"This act is not peculiar on account of its recital of facts. Such recitals abound in the multitude of special acts passed for the relief of individual persons, and to require all the facts recited to be proved in court or elsewhere before the parties can obtain the money granted to them would be an unjustifiable hardship."

And this judgment was affirmed by this court, the views of the Court of Claims being concurred in. *United States* v. *Jordan*, 113 U. S. 418, 422.

When, therefore, the first paragraph of the preamble recites that the claimants "did on the 28th day of October, 1868, purchase a certain building situate on lot known as No. 1, on the official plat of the town of Sitka, in the Territory of Alaska, from the Russian American Company, *the owner of said building*," the Government can no more contradict, as matter either of fact or of law, the claimants' allegation that the Russian American Company was the owner of the building, than it can the other allegation that the claimants purchased it. Nor is this conclusiveness of the recital overcome by that portion of the body of the act which provides that "if said court shall find that said parties acquired a valid title to said buildings respectively alleged to have been purchased by them, said court shall award to said parties a fair and reason-

able rent," etc. The statements in the preamble must be given their full effect, notwithstanding the subsequent language of the act which provides that if the court finds that the parties acquired a valid title it shall decide in their favor.

In other words, the act recites as conclusions of fact and law established to the satisfaction of Congress, that these claimants purchased the building, and that the building was the property of the Russian American Company at the time of said purchase, and then submits to the Court of Claims the determination of three questions:

1. Whether such a purchase from such an owner vested the claimants with a valid title.

2. If so, what was the use and occupation of the property worth during the time it was held by the Government?

3. What was the value of the building itself?

The interpretation of the act of Congress granting jurisdiction to the Court of Claims, approved January 17, 1887, must be governed by a broad sense of justice, and a determination to give the fullest effect to all parts of the act. To accept a different position would be to render nugatory the purpose of the act. The contention that the act in one line asserted a title to the property under the principles of international law, as shown by the protocol of the commissioners appointed under the treaty between Russia and the United States, and in another permitted an investigation of that title by the strictest rules of the common law, as contended by the Court of Claims, would defeat, if adopted, the purpose of the act, by thus failing to give due force and effect to the whole language of the act, construing all the parts together.

The Court of Claims, through Judge J. C. B. Davis, in the case of *Dahlgren* v. *United States*, 16 C. Cls. 30, in discussing an act of Congress referring a claim to the

court, which presents features similar to the act now under discussion, held (par. 1 of syllabus, p. 31):

"Where the Government has a special defense to a claim, and the facts constituting the defense are well known to Congress, it is unreasonable to suppose that Congress would refer the claim to this court with the intent that the special defense should be set up and the claim defeated thereby."

Applying the principles there laid down, the Court of Claims should, in the case at bar, have accepted the preamble as a correct recital of the facts, stated therein to be such, and have determined, first, whether Kinkead and Sussman had acquired the building in controversy by virtue of purchase from the Russian American Company; and, second, whether the claimants had acquired a valid title to said building; in other words, if the vendor of the building had a valid title to dispose of. The court has found as a fact, on the first point, that the claimants did acquire a building by purchase from the Russian-American Co. and, second, that the building was classed as "private property" in the protocol and schedule attached thereto, as provided by the treaty. Third, that the United States never denied the ownership of said building in the grantor of these appellants before the ratification of the treaty. The court, however, in its opinion, has failed to give effect either to the facts found by it, or to the preamble of the act giving jurisdiction. The protocol was the last act done by representatives of the nations in interest, and was accepted by Secretary Seward, and, as is seen, also by Congress, as a final determination on the point as to which property was public and which was private. The distinctions made by the Court of Claims ignore the legal effect of the protocol, and also of the preamble to the special act granting jurisdiction.

In the case of *Choctaw Nation* v. *United States*, 119 U. S.

1, this court throughout disregarded contentions which would have been fatal to the observance of treaty obligations.

As having a legitimate and forcible bearing on the proper construction of the act, we deem it proper to lay before the court *in extenso* the unanimous report of the committee of the House of Representatives accompanying the bill which afterwards became the act of January 17, 1887, referring this claim to the Court of Claims.

It is proper to state in so doing that in regarding this report as properly to be referred to in construing the statute, we have the authority of the Court of Claims itself in a recent and very ably argued and carefully considered case involving that question. In *Austin* v. *United States*, 25 C. Cls. 437, 454, after holding in accordance with decisions of this court that the debates in the *Congressional Record* can not properly be referred to, it is said:

"It is not sought in this case to introduce the *Congressional Record* for the purpose of showing what the individual Members of Congress said in debate on the passage of the bill; but it is claimed that a report of a committee of the Senate, accompanying the bill, is proper to be considered by the court, that being a public document, within the meaning of the decision of the court in the case last cited. It seems to us, in view of all the authorities, that a report of a committee of either house of Congress, unanimous in its character, submitting and accompanying an amendment to a bill, may be considered by the court in construing such amendment in a case of doubtful interpretation. It is an undoubted rule of construction, that the language of a statute is the best and highest criterion of construction; but where such language fails to perform the function of construction, then other lights may be used in arriving at a conclusion, as to the intent of the legislation."

In support of this ruling the court cited *Blake* v. *Na-*

tional Banks, 23 Wall. 307, where the parliamentary history of a statute, including the introduction and passage of amendments and report of the committee of conference on the disagreeing votes of the two Houses were referred to in ascertaining the meaning of a doubtful provision. It might also have cited to the same effect *United States* v. *Steever*, 113 U. S. 747, 754, 755, where the report of the Committee on Naval Affairs of the House of Representatives accompanying the bill which afterwards passed as the Act of August 8, 1882, under which the claim in that case came before the Court of Claims, was referred to, and was held to throw light on the proper construction of the act. In *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, this court went further, and considered the representations made to Congress so far as these appeared in the official proceedings.

Such views, as applied to the Court of Claims, find express statutory sanction in Section 1076 of the Revised Statutes, which, referring to that court, provides:

"The said court * * * shall have the use of all recorded and printed reports made by the committees of each House of Congress when deemed necessary in the prosecution of its business."

We therefore here give in the form of an appendix to this brief the report in full, as made by Hon. Joseph McKenna, now U. S. Circuit Judge for the Ninth Circuit, then a member of the Committee on Claims of the House of Representatives.

Congress evidently acted upon the supposition that it was granting full relief, and intended, as in the case of *Roberts* v. *United States*, 92 U. S. 41, 49, above referred to, to submit to the Court of Claims as the principal question the amount of compensation to which the claimants are entitled. Certainly the act lacks upon its face every indica-

tion of an intention so inequitable as to claim the right to the seizure and continued occupation of the building on the sole ground of a fee-simple title to the land on which it was situated.

2. The Title of the Russian-American Company.

The building in question was erected in the year 1845, by the Russian-American Company at their own expense, and from that time to the date of the treaty had been used by said company as a warehouse for the storage of furs and other property, and for trading purposes. (Page 5, Finding 1.)

To appreciate the significance of this fact it is necessary to advert to the dual capacity of this Russian-American Company. Not only was it a great trading corporation, but, like the East India Company, it united with this capacity that of the governing body of the country. As the Court of Claims in its opinion, page 8, says: "This company not only had a monoply of trade and all sources of wealth in the whole of this vast territory, but exercised over it all the powers of government."

The despotic powers which it exercised are vividly depicted by Senator Sumner in his famous speech on the ratification of the treaty of cession, which has become an almost classic authority on this subject. It will be found in full in H. R. Ex. Doc. No. 177, 40th Congress, 2d Session, which contains all the papers relative to the transfer of Russian America to the United States, as communicated by the President to the House of Representatives. Mr. Sumner says, page 152:

"The company has not been without criticism. Some of the pictures of it are by no means rose color. These, too, may furnish instruction for the future. Early in the century its administration was the occasion of open and repeated complaint. It was pronounced harsh and

despotic. Langsdorf is indignant that 'a free trading company should exist independent of the Government, not confined within any definite regulations, but who can exercise their authority free and uncontrolled, nay, even unpunished, over so vast an extent of country.' In stating the case he adds that 'the Russian subject here enjoys no protection of his property, lives in no security, and if oppressed has no one to whom he can apply for justice. The agents of the factories and their subordinates, influenced by humor or interest, decide everything arbitrarily.' (Voyages, vol. 2, p. 70.) And this arbitrary power seemed to prevail wherever a factory was established: 'the stewardship in each single establishment is entirely despotic, though nominally depending upon the principal factory. These stewards do just what they please without the possibility of being called to account.' (*Ibid.* vol. 2, p. 69.) If such was the condition of Russians, what must have been that of the natives? Here the witness answers; 'I have seen the Russian fur hunters dispose of the lives of the natives solely according to their own arbitrary will and put these defenseless creatures to death in the most horrible manner.' (P. 70.) Krusenstern concurs in this testimony, and, if possible, darkens the colors. According to him, 'every one must obey the iron rule of the agent of the American Company, nor can there be either personal property or individual security where there are no laws. The chief agent of the American Company is the boundless despot over an extent of country which, comprising the Aleutian Islands, stretches from 57° to 60° of latitude, and from 130° to 190° of east longitude'; and he adds, in a note, 'there are no courts of justice in Kodiak, nor in any of the Company's possessions.' (Voyages, vol. 2, p. 107.) Kotzebue, who came later, while confessing his incompetency to speak on the treatment of the natives by the Company, declares his 'wounded feelings and commiseration.' (Voyage, vol. 3, p. 314.) It is too probable that the melancholy story of our own aborigines has been repeated here. As these criticisms were by Russian officers they must have had a certain effect. I can not believe that the recent government, administered by the enlightened magistrates of

whom we have heard, has been obnoxious to such terrible accusations; nor must it be forgotten that the report of Lisiansky, the other Russian officer who was there at the same time, is much less painful."

Not only was the American Company authorized to administer the government in its own way, but it possessed the power of sub-letting or transferring its franchises and privileges to other parties, and had exercised that authority. "The charter of the Russian-American Company was about to expire. This Company had already underlet to the Hudson Bay Company all its franchises on the main land between 54° 40′ and Mount St. Elias; and it now was proposed that an American Company, holding direct from the Russian government, should be substituted for the latter." (H. R. Ex. Doc. 177, 40th Cong. 2d sess. p. 133.)

Mr. Clay, United States Minister at St. Petersburg, under date of February 1, 1867, says: "The Russian Government has already ceded away its rights in Russian America for a term of years, and the Russo-American Company has also ceded the same to the Hudson Bay Company." (*Ib.*, p. 133.)

The attention of the court is invited to these authorities, because they illustrate the situation of the framers of the treaty when they undertook to transfer the territory and dominion of Alaska from Russia to the United States. They were not engaged in transferring territory which was unincumbered by cessions of franchises and former grants. On the other hand, vested rights, privileges, and immunities had been conferred, and questions of extreme delicacy had to be considered. The *quasi*-sovereignty of the Russian-American Company, as well as that of the Hudson's Bay Company, was to be abrogated, and all the prerogatives and powers possessed by these corporations, which could not be conferred or exercised by a corpora-

tion within the jurisdiction to which the territory was about to be transferred, were to be extinguished. At the same time, the rights of individuals, corporate or natural, were to be protected. The rights of persons and property, as recognized by the civilized world, and particularly as observed by the Constitution and laws of the United States, to whose custody the inhabitants of the territory were to be transferred, were to be carefully guarded and protected.

As Mr. Sumner, in the speech we have referred to, says (H. R. Ex. Doc. No. 177, 40th Congress, 2d Sess. p. 135):

"The sum of seven millions was originally agreed upon; but when it was understood that there was a fur company and also an ice company enjoying *monopolies* under the existing government, it was thought best that these should be extinguished, in consideration of which our government added $200,000 to the purchase money, and the Russian government, in formal terms, declared 'the cession of territory to be free and unincumbered by any reservations, privileges, franchises, grants or possessions, by any associated companies, whether corporate or incorporate, or by any parties, except merely private individual property-holders.' Thus the United States received this cession free of all incumbrances, so far, at least, as Russia is in a condition to make it. The treaty proceeds to say, that 'the cession hereby made conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion and appurtenances thereto.' In other words Russia conveys *all that she has to convey.*"

Again: To hold that this building was included in the cession it is necessary to determine, first, that it was a "reservation," "privilege," "franchise," "grant," or "possession"; and, secondly, that it was an incumbrance upon the cession or title of the territory and dominion of the Territory of Alaska. The logical sequence

of which is, that where one government cedes territory and dominion to another, the use and ownership of a building (personal property) situate within such territory by any person, natural or corporate, is an *incumbrance* upon the cession or title of such territory and dominion.

Such an idea is at war with every sound principle of construction. It is condemned by common justice, by every principle of international law, and by repeated decisions of this court. In *United States* v. *Percheman*, 7 Peters, 51, 86, this court, through Chief-Justice Marshall, said:

"It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged—if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory? Had Florida changed its sovereign by an act containing no stipulation respecting the property of individuals, the right of property in all those who became subjects or citizens of the new government would have been unaffected by the change. It would have remained the same as under the ancient sovereign. The language of the second article conforms to this general principle: 'His Catholic majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him situated to the eastward of the Mississippi, by the name of East and West Florida.' A cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belongs to him. Lands he had previously granted were not his to cede. Neither

party could so understand the cession. Neither party could consider itself as attempting a wrong to individuals condemned by the practice of the whole civilized world. The cession of a territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property.

"If this could be doubted, the doubt would be removed by the particular enumeration which follows: 'The adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which are not private property, archives, and documents which relate directly to the property and sovereignty of the said provinces, are included in this article.'

"This special enumeration could not have been made had the first clause of the article been supposed to pass not only the objects thus enumerated, but private property also. The grant of buildings could not have been limited by the words 'which are not private property' had private property been included in the cession of the territory."

To the same effect are the following authorities: Halleck International Law, 122, 123; *Henderson* v. *Poindexter*, 12 Wheat. 535; *Soulard* v. *United States*, 4 Pet. 511; *United States* v. *Arredondo*, 6 Pet. 691; *Delassus* v. *United States*, 9 Pet. 117; *Strother* v. *Lucas*, 12 Pet. 436.

It will hardly be denied that this principle of international and constitutional law protecting the rights of private property applies to corporations with the same force as to natural persons.

This point was treated by the court as too plain to require extended argument in the case of *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, where we quote from page 396 as follows:

"One of the points made and discussed at length in the brief of counsel for defendants in error was that 'Corpora-

tions are persons within the meaning of the fourteenth amendment to the Constitution of the United States.' Before argument—

"Mr. Chief-Justice Waite said: The court does not wish to hear argument on the question whether the provision in the fourteenth amendment to the Constitution which forbids a State to deny to any person within its jurisdiction the equal protection of the laws applies to these corporations. We are all of opinion that it does."

Again in *Pembina Mining Company* v. *Pennsylvania*, 125 U. S. 181, 189, it was said: "Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' *Providence Bank* v. *Billings*, 4 Pet. 514, 562."

And again in *Minneapolis Railroad Company* v. *Beckwith*, 129 U. S. 26, 28: "It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara County* v. *Southern Pacific Railroad Co.*, 118 U. S. 394, 396, and the doctrine was reasserted in *Pembina Mining Company* v. *Pennsylvania*, 125 U. S. 181, 189. We admit also, as contended by him, that corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it."

Certainly there was nothing in the laws or governmental policy of the United States inconsistent with the

holding of property by the Russian-American Company in the ceded territory after the delivery or possession of that territory to the United States, at all events for such reasonable time as might be necessary to enable them to sell or dispose of it. *Christian Union* v. *Yount*, 101 U. S. 352.

The Court of Claims seems to have based its decision adverse to this claim upon the maxim of the common law, *Quicquid plantatur solo solo cedit.* But even at common law this rule was subject to many qualifications. Courts of equity always made allowances for improvements erected in good faith upon land, even under defective title. In *Canal Bank* v. *Hudson*, 111 U. S. 66, 83, this court thus stated the principle: "Where a party lawfully in possession under a defective title makes permanent improvements, if relief is asked in equity by the true owner, he will be compelled to allow for such improvements. 2 Story, Eq. Jur. Sec. 1237, note 1; *Bright* v. *Boyd*, 1 Story, 478, and 2 *Id.* 605; *Putnam* v. *Ritchie*, 6 Paige, 390; *Williams* v. *Gibbes*, 20 How. 535."

The fact is that the application of common law principles to the decision of a case like this, arising under a totally different state of affairs from any which was contemplated by the common law, can only be misleading.

Russian America at the time of the cession to the United States remained what it had been for ages past, an almost totally unexplored country, with the merest fringe of a settlement on its coasts. The paramount sovereignty was in the government of Russia, and, so far as appears, that government had never undertaken to deal with the land by any comprehensive system of land grants such as the present public land system of the United States. The monopoly of trade which was in effect conceded to the Russian-American Company in Alaska necessarily required and involved the erection of build-

ings for the purpose of carrying on that trade, and, in addition to such occupation by itself, that Company also exercised the right of apportioning the lands among its employees. In a special memorandum, relative to the Russian system of division of land in Alaska, communicated by the American Minister at St. Petersburg to Secretary Seward, we find the following (H. R. Ex. Doc. 177, 40th Congress, 2d Session, p. 23):

"The Imperial Government while granting to the Russian-American Company, for a determined period, the exclusive possession and use of our territory in America, conceded to the Company the right (Statute, chapter 8, section 2, section 228) 'to settle upon fitting grounds those of the old servants who would be willing, and to supply them with dwellings and implements at the cost of the Company.' Otherwise, as to the apportionment of lands to such settlers, there were no particular regulations, restrictions, or formalities. Usually the chief administrator, conforming to the statute (Section 162), at the installation of an applicant for settlement, or of his family, assigned a place for the new settlement, according to his own better understanding; and this simple designation of whereabouts gave the settler a right to occupy and use such area of land and trading grounds as he could or thought it necessary to occupy for his housekeeping and fishing requirements; only, in order to avoid contestations between the settlers and the natives, particular attention was paid to the division between them of streams and other trading places, so that neither the natives nor the colonists could have any right to fish or hunt upon grounds to them not assigned. Under this system of distribution of lands and trading grounds the first occupation and using of a certain locality, whether by an individual or by a community, notwithstanding the lack of formalities, conferred unquestionable right of possession, and, therefore, in case that these territories would have to revert from out the competency of the Company into the hands of the Imperial Government, said right would be recognized and formally

confirmed for the future as right of property. Such settlers exist in the districts of Kadiak, Atkha and Ounga, and belong, all of them, owing to the character of their housekeeping and trade, to the section (register) of country inhabitants. Moreover, there is a certain number of individuals who hold like right of possession in the port of New Archangel. Some of them possess but houses and yards in the limits marked upon the plan of the port of New Archangel; others possess, in addition, field grounds. Upon the whole, the settlers who live in New Archangel, considering the local conditions of their life, can not be properly counted to the number of citizens, as well as the port of New Archangel itself can not be properly called a city."

It is not at all surprising to find in the latter part of this memorandum the following statement (p. 24):

"From all, what we said, it clearly appears, that in this region no attempts were ever made, and no necessity ever occurred to introduce any system of land-ownership; the country occupied by savages is too vast; they use to camp in certain fit places, generally marked by mountains, rivers, and streams, each having its name, but no fixed boundaries whatever, and their migrations are guided by wild instinct and unbounded will. All this region has neither past nor present, and it may be confidently said of the future, that it is far and impenetrable."

All this fully demonstrates the loose and undefined character of the title of the Russian-American Company to lands in Alaska, and the futility of any attempt to apply to this case the maxims of the common law. Our own system of dealing with the public lands will supply safer analogies, if any are needed. In any event the Russian-American Company was not a trespasser on the land on which this warehouse was built. The Company was lawfully there, and this house was its property, erected for the purpose of private trade and gain, and could not

rightfully be seized by the government either of Russia or of the United States without recompense. Under similar circumstances a settler on public lands of the United States would have been held to have acquired equities which it was incumbent upon the government to respect. Such has been the uniform course of this government in its dealings with those who have settled upon the public lands.

In *Lamb* v. *Davenport*, 18 Wall. 307, 314, this court said, with reference to certain proceedings taken by the early settlers in Oregon for the disposition of public lands there in advance of survey, or of any act of Congress providing for the acquisition of title: "Of course no legal title vested in any one by these proceedings, for that remained in the United States—all of which was well known and undisputed. But it was equally well known that these possessory rights, and improvements placed on the soil, were by the policy of the government generally protected, so far, at least, as to give priority of the right to purchase whenever the land was offered for sale, and where no special reason existed to the contrary. And though these rights or claims rested on no statute, or any positive promise, the general recognition of them in the end by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new Territories, gave a decided and well-understood value to these claims. They were the subjects of bargain and sale, and as among the parties to such contracts they were valid."

Again, in *Rector* v. *Gibbon*, 111 U. S. 276, the court said (pp. 284, 285): "Whenever Congress has relieved parties from the consequences of defects in their title, its aim has been to protect those who, in good faith, settled upon public land and made improvements thereon; and not those who by violence or fraud or breaches of contract

intruded upon the possessions of original settlers and endeavored to appropriate the benefit of their labors. There has been in this respect in the whole legislation of the country a consistent observance of the rules of natural right and justice. There was a time, in the early periods of the country, when a party who settled in advance of the public surveys was regarded as a trespasser, to be summarily and roughly ejected. But all this has been changed within the last half century. With the acquisition of new territory, new fields of enterprise have been opened, population has spread over the public lands, villages and towns have sprung up on them, and all the industries and institutions of a civilized and prosperous people have been established, with the church and school-house by their side, before the surveyor with his quadrant and line appeared. With absolute confidence these pioneers have relied upon the justice of their Government, and they have never been disappointed."

It seems to us that the Court of Claims might more properly have adopted as the rule of construction in this case the principles thus so emphatically announced by this court, and have adjudicated to these claimants the value of the improvements purchased by them in good faith from the Russian-American Company, rather than have decided the case on maxims of the common law wholly inapplicable to the peculiar circumstances of the case. It does not follow that, because a party may have the fee-simple title to land he is entitled to lay claim to everything built upon that land, so as to deprive those who have in good faith invested their money, of the value of their improvements placed thereon.

In the case of *Searl* v. *School District*, 133 U. S. 553, this court had before it an inequitable attempt by the owner of land taken for school purposes to secure for himself the value of a school-house erected by the Government

authorities upon the land. The school-house was built in advance of regular condemnation proceedings, and while the title of the school district was as yet imperfect. Upon regular condemnation proceedings being afterwards instituted he claimed that the school-house belonged to him, being erected upon his land, and that he should, therefore, be paid for it. The comments of this court upon such a case (speaking through Mr. Chief-Justice Fuller) were as follows (p. 561): "The argument is that the moment the school-house was completed it belonged to the owner of the land by operation of law, and therefore that he was entitled to be recompensed for it upon condemnation. The maxim *quicquid plantatur solo solo cedit*, is not of universal application. Structures for the purposes of trade or manufacture, and not intended to become irrevocably part of the realty, are not within the rule, *Van Ness* v. *Pacard*, 2 Pet. 137; nor is it applicable where they are erected under agreement or by consent, the presumption not arising that the builder intended to transfer his own improvements to the owner. And courts of equity, in accord with the principles of the civil law, when their aid is sought by the real owner, compel him to make allowance for permanent improvements made *bona fide* by a party lawfully in possession under a defective title. Story Eq. Jur. Sec. 1237."

Is not the converse of this principle applicable to this case? If a private party, or what is the same thing, a private corporation, has erected a building upon land in which he had a right of possession if not an equitable interest, must he not be recompensed before being required to yield possession?

The United States Government, upon receiving the ceded territory from Russia, desires to occupy the building for public uses. Can it equitably do so without recompensing the owner? Perhaps, as the Court of Claims

suggests, the building could not well be occupied without also occupying the land upon which it was built, but the argument might be reversed, and it might be said that the Government could not occupy the land without also occupying the building. Whatever difficulties there might be in reconciling these conflicts of ownership are fully removed by the special act of Congress under which this case found its way into the Court of Claims. That act recognized the rights of the claimants in the building by providing for their acquisition by the Government.

Much stress is placed by the Court of Claims upon the fact that $200,000 was added to the consideration money in the course of the negotiations in order to free the ceded territory from all incumbrances, and in this connection the correspondence between the Secretary of State and the Russian Minister is quoted (Record, pp. 19, 20).

Secretary Seward's language certainly does not import any intent to go further than to extinguish the exclusive monopolies, or "franchises," of the Russian-American Company, while the language of the Russian Minister is even more unmistakably plain in that regard. His understanding of the demand is "that the territory to be ceded to the United States must be free from any *arrangement and privileges* conceded either by government or by companies."

Surely it was not within the contemplation of the writer of these words that he was surrendering the right of Russian citizens to their property in the territory. It was enough that their "privileges" were to be extinguished, that existing "arrangements" were to be abrogated, without taking away from them that which they had acquired and could call their own.

The Court of Claims lays much stress upon the use of the term "individual" in the treaty, as applied to the private property, which alone was excepted from the

transfer to the United States. The property of a corporation is that of the individuals composing it. The fact that they are associated together gives them no greater, and no less, right to their property than if they were called partners instead of stockholders. Franchises and monopolies may indeed be conferred by the government upon incorporated societies, and the same power that gives these can take them away, but the right of property is an inherent natural right, arising prior to all written laws, and guaranteed in the most solemn manner by the Constitution of the United States and of every one of the States. Had this association been a partnership there can be no question that its right to this property would have been sustained as being not only private but individual property. The right is no greater and no less when the individuals owning the property are associated together in a corporate name. This point is fully and ably treated by Attorney-General Williams, whose opinion in a similar case we shall cite *in extenso* later on in this brief.

In *Baltimore & Potomac Railroad Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 330, it was said (the opinion being by Mr. Justice Field): "Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association."

Indeed, Chief-Justice Marshall in his celebrated definition of a corporation in the Dartmouth College case, makes individuality one of its main characteristics. "Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual." *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518, 637.

Mr. Morawetz, in the preface to his valuable work on corporations, emphasizes the idea that the rights and duties of a corporation are nothing more than the rights and duties of the persons composing it, and the same view governs his definition of a corporation in the very first section of the body of the work.

3. Contemporaneous Construction of the Treaty.

By the 4th article of the treaty it is provided that the Emperor of Russia shall appoint an agent "for the purpose of formally delivering to a similar agent, or agents, appointed on behalf of the United States, the territory and dominion, property, dependencies, and appurtenances, which are ceded as above, and for doing any other act which may be necessary in regard thereto." Under this provision the Imperial Government appointed Alexis Pestchouroff, and the President appointed General Lovell H. Rousseau, their respective commissioners. The instructions from the United States Government to its agent, General Rousseau, touching this subject, are as follows (Record, p. 6):

"Pursuant to the stipulations of the treaty, that transfer will include all forts and military posts and public buildings, such as the governor's house and those used for governmental purposes, dock-yards, barracks, hospitals and schools; all public lands, and all ungranted lots of land at Sitka and Kodiak. Private dwellings and warehouses, blacksmiths', joiners', coopers', tanners', and other similar shops, ice-houses, flour and saw-mills, and any small barracks on the islands, are subject to the control of their owners, and are not to be included in the transfer to the United States."

The instructions to Captain Pestchouroff from the Russian government were as follows:

"3. All the forts and military posts will be delivered

at once to the American military forces that may follow the United States commissioner. * * *

"4. The public buildings, such as the governor's house, the buildings used for government purposes, dock-yards, barracks, hospitals, schools, public grounds, and all free lots at Sitka and Kodiak, will be delivered by Captain Pestchouroff to the American commissioner as soon as practicable.

"5. All the houses and stores forming private property will remain to be disposed of by their proprietors. To this same category belong smiths, joiners, coopers, tanners, and other similar shops, as well as ice-houses, saw and flour mills, and any small barracks that may exist on the islands." * * * (H. R. Ex. Doc. No. 177, 40th Cong. 2d Sess. p. 19.)

Now all the property of the class described in the instructions to the commissioners above quoted was the exclusive property of the Russian-American Company, and no property of that class, viz. stores, warehouses, shops, etc. were owned by any person or persons, saving and excepting the Russian-American Company, and such as may have belonged to the Hudson Bay Company.

Note, too, the specific references in both sets of instructions to the "public buildings, such as the governor's house" and those "used for government purposes," etc., clearly excluding the idea of buildings used for purposes of trade.

Pursuant to these instructions, the commissioners proceeded to Alaska, effected in the name of their respective governments the transfer of the territory, dominion, and property included in the cession; reported their action, which was approved by their respective governments, and the whole matter was concluded.

General Rousseau, in his official report of the transfer of this property (at Sitka), says (Record, p. 8):

"The town of New Archangel (Sitka) was built in the

main by the Russian-American Company, and, except the dwellings transferred by them to their employés and the public buildings transferred to the United States, is owned by that Company still. Yet it has but a possessory interest in the land, as it only had permission to erect buildings upon it, for, although it had authority to vest the title of lands in its employés, it had no power to vest such title in itself. The Commissioners left the matter as they found it, and the Company in possession of its buildings.

"All the buildings in any wise used for public purposes were delivered to the United States Commissioner, taken possession of, and turned over to General Davis, as were also the public archives of the Territory, and in a spirit of liberality the wharf and several valuable warehouses belonging to the Russian-American Company were included in the transfer by the Russian Commissioner."

On the 5th day of December, 1867, General Rousseau transmitted to the Department of State a report of his proceedings as such Commissioner, which was acknowledged by the Secretary of State on the 24th of January, 1868, in which acknowledgment Mr. Seward says:

"The proceedings referred to have been submitted to the President, and I am directed to acknowledge the reception of the papers and to communicate the President's satisfaction with the manner in which your important and delicate trust was executed." (Record, p. 7.)

Major-General Davis, commanding in Alaska, who was present in Sitka at the formal transfer, in his report says:

"The commissioners turned over to us [at Sitka] some eleven or twelve buildings in all; several of them were only sheds, which could be made useful only for temporary shelter for stores. I think many more houses should have been considered United States property, *but it was the business of the commissioners to decide these questions, not mine.*" (H. R. Ex. Doc. 177, 40th Cong. 2d Sess. p. 108.)

The identical questions involved in this case were submitted to Attorney-General Williams in 1873 by the Secretary of the Treasury in the case of Hutchinson, Kohl & Company, who had purchased buildings from the Russian-American Company under circumstances similar to those of the purchase made by the present claimants. An opinion was given by Mr. Williams, and as that opinion is in its entirety applicable to the present case, we here cite it in full from 14 Opinions of Attorneys-General, 302, 303, 309.

"DEPARTMENT OF JUSTICE,
"*September* 27, 1873.

"SIR: I have examined the papers submitted to me under cover of your communication of the 15th ultimo, touching the right of the United States to certain buildings in Alaska, which are claimed by Messrs. Hutchinson, Kohl & Co. under a purchase alleged to have been made by them from the Russian-American Company in March, 1868.

"It appears by a schedule found with the papers that the buildings referred to are located at fifteen different posts or places in Alaska, and that they consist of warehouses, store-houses, blacksmith-shops, cooper-shops, fish-houses, boat-houses, cow-houses, salt-houses, and dwelling-houses. You inform me that it has heretofore been claimed by your Department that the title to this property vested in the United States, under the treaty with Russia of March 30, 1867, ceded to the United States the Russian possessions in North America (15 Stat. 539), and you desire an expression of my views as to the validity of that claim.

"By the provisions of the 1st article of the treaty, Russia cedes to the United States all the territory and dominion possessed by the former on the continent of America, and in the adjacent islands contained within certain geographical limits therein set forth.

"The 2d article declares that in the cession made by the preceding article 'are included the right of property

in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property.' But churches built in the ceded territory by the Russian Government are to remain the property of such members of the Greek Oriental Church resident in the territory as may choose to worship therein.

"In the 6th article, the cession is declared to be 'free and unincumbered by any reservations, privileges, franchises, grants or possessions by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties except merely private individual property-holders,' and it is furthermore declared to convey all the rights, franchises, and privileges belonging to Russia in the said territory or dominion and appurtenances thereto.

"The 4th article provides for the appointment on the part of Russia of an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the 'territory, dominion, property, dependencies, appurtenances,' ceded, etc.; but by the same article the cession, with the right of immediate possession, is nevertheless to be deemed 'complete on the exchange of ratifications, without waiting for such formal delivery.'

"The foregoing would seem to embrace all the provisions of the treaty which have any relation to or bearing upon the subject presented.

"The Russian-American Company, from which the purchase of the buildings in question is alleged to have been made by Hutchinson, Kohl & Co., was a trading company, chartered by the Emperor of Russia, and at the period when the treaty was entered into appears to have enjoyed, under a grant contained in its charter, the exclusive possession and use of the territory included in the cession. This company had also been invested with governmental powers over the whole region, which were administered through its officers and agents. Its establishments there were in part of a public and in part of a private character; the former comprising such buildings and structures as were erected for purposes of administration,

police, military defense, and the like, and the latter composing such as were erected more especially for the purpose of carrying on its trading operations.

"The Company was authorized to allot their employés such lands as they needed for their housekeeping and other requirements, but it does not seem to have possessed the capacity to acquire for itself any title to the soil. It enjoyed nothing more than the use of the land on which its buildings stood, the dominion or right of property therein remaining with the government of Russia.

"In the 6th article of the treaty, as has been already observed, the cession of 'territory and dominion' therein made is declared to be 'free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property-holders,' etc. The effect of this provision undoubtedly was to extinguish the rights of possession and use and all other privileges which the Russian-American Company then held in the territory ceded; so that the United States acquired such property wholly discharged therefrom, and became absolute proprietor of all the lands occupied by the establishments of that company.

"Did the ownership of the buildings constructed by the Russian-American Company pass with the lands on which they were erected? That such was not the understanding of those who made the treaty is obvious from the fact that a separate provision was made for the transfer of a certain class of buildings.

"By the 2d article of the treaty the cession includes 'all public buildings, fortifications, barracks, and other edifices which are not private individual property.' It is very clear that this language comprehends all structures of a public character (*i. e.*, those used or intended to be used for governmental purposes) which had been erected by the Company. But that it was not designed to comprehend other structures built thereby, of a private character (*i. e.* those used or intended to be used for purposes of trade simply, such as the buildings alleged to have been purchased by Hutchinson, Kohl & Co.) is, I think,

evident from the subsequent action of both governments, parties to the treaty, in carrying it into effect.

"Thus, in the instructions given by the Government of Russia to the Russian agent or commissioner, appointed in pursuance of the 4th article of the treaty, the following directions with regard to the formal transfer of the ceded territory appear: '3. All the forts and military posts will be delivered at once to the American military forces that may follow the United States commissioner,' etc. '4. The public buildings, such as the governor's house, the buildings used for governmental purposes, dock-yard, barracks, hospitals, schools, public grounds, and all free lots at Sitka and Kodiak, will be delivered,' etc. '5. All the houses and stores forming private property will remain to be disposed of by their proprietors.' 'To this same category belong smiths', joiners', coopers', tanners', and other similar shops, as well as ice-houses, saw and flour mills, and any small barracks that may exist on the islands.'

"The instructions given by the Government of the United States to the American commissioner appointed in pursuance of the same article of the treaty contain the following directions respecting the formal transfer of the territory: 'Pursuant to the stipulations of the treaty, that transfer will include all forts and military posts, and public buildings, such as the governor's house and those used for government purposes, dock-yards, barracks, hospitals and schools, all public lands, and all ungranted lots of ground at Sitka and Kodiak. Private dwellings and warehouses, blacksmiths', joiners', coopers', tanners', and other similar shops, ice-houses, flour and saw mills, and any small barracks on the islands are subject to the control of their owners, and are not to be included in the transfer to the United States.'

"From the instructions given by each government it is manifest that the provisions of the treaty, so far as they relate to the transfer of buildings in the ceded territory, were at the very beginning understood by both parties thereto in substantially the same sense and as having the same effect, and that according to this understanding all houses and structures, of whatever kind, destined for

private purposes, and falling within the category of private property, were excluded from such transfer, and left in the ownership of those to whom they then belonged.

No doubt appears to have been entertained by any one at the time that the property of the character just mentioned was excepted from the operation of the treaty; but it has since been suggested that the exception only applied to such property as was owned by natural persons, and not to that possessed by incorporated companies; and upon this idea, as it seems, rests the claim heretofore asserted by your Department, that the title to the buildings in question passed under the treaty to the United States. In support of the view here adverted to, the provisions already quoted from the 2d and 6th articles of the treaty are relied upon.

"As to the 6th article, however, it is plain that the provisions thereof only contemplate rights and privileges within the territory which adhere to or concern the soil or domain, and do not apply to proprietary interests in the houses and structures thereon erected. The latter are separately and specially provided for in the 2d article. By the provisions of this article edifices which are 'private individual property' are not included in the cession; and it appears that the words 'private individual property' there employed have been taken in your Department to mean property owned by individual persons, in contradistinction from property owned by associated or incorporated companies.

"This construction, regard being had to the objects of the treaty, is obviously too narrow; for the transfer and acquisition of buildings erected for purposes of trade and other merely private uses certainly can not be reckoned as among those objects. It seems to me that the phrase mentioned must be taken to refer to property pertaining to individuals, whether associated or not, including also artificial persons or corporations, as distinguished from property pertaining to the public, and that it is not to be understood in a less comprehensive sense than the terms 'private property' simply, which unquestionably embrace property of the former description.

"There are instances in treaties of cession where similar

phraseology has been used in the full sense of those terms. On reference to the second article of the treaty with France of April 30, 1803, we find in the French version a cession of 'tous les bâtiments publiques, fortifications, cazernes et autres édifices qui ne sont *la propriété d'aucun individu.*' (8 Stat. 203.) So in the 2d article of the treaty with Spain of February 22, 1819, the Spanish version contains a cession of 'edificios publicos, fortificaciones, casernas y otros edificios, que no sean *propriedad de algun individuo particular.*' (8 Stat. 255.) The passages underscored, interpreted according to the literal meaning of the words, might, perhaps, be considered to signify property in the ownership of natural individual persons, exclusively of that owned by companies or corporations or by the public. But when interpreted according to the intention of the respective parties they evidently mean private property, and that in an unqualified sense. This is shown by the circumstance that the expression 'private property' is made use of without any qualification in the corresponding provisions of the English version of the same treaties. (8 Stat. 202, 254.)

"To construe the treaty in question, at the time of its execution, was the province of the State Department, and that department having made and published its construction, upon which the Government took definite action, it would seem that another department of the Government would be hardly justified in afterward reversing that construction because some doubts were raised as to its correctness.

"Hutchinson, Kohl & Co., finding the buildings which they purchased in the hands of the Russian-American Company after the transfer under the treaty had been fully made, and having knowledge, as it may be presumed, of the instructions given by both governments to their commissioners, declaring in effect that these buildings were the property of the company, purchased and paid for the same in good faith, and it would now be unjust, if not illegal, for the Government to deprive them of this property on the alleged ground that there was error in the decision in pursuance of which the purchase was made. As against the

claim of a private party, acts under similar circumstances would amount to an equitable estoppel.

"It is also suggested that $200,000 was added to the $3,000,000 purchase-money first agreed upon, to indemnify the Russian-American Company for the buildings in question; but in addition to the franchises given up by that company they had constructed a great number of public works and buildings, which were transferred by the treaty, and which account for the payment of the $200,000.

The conclusions at which I arrive, and which seem to be fairly deducible from the foregoing considerations, are that the ownership of *some* only of the buildings of the Russian-American Company passed under the disposition made by the treaty to the United States, viz. those used for governmental or public purposes; that the ownership of other buildings of the same Company, viz. those used for trading and other merely private purposes, did not thus pass, and consequently that, as the buildings alleged to have been purchased from that Company by Hutchinson, Kohl & Co. appear to belong to the latter class, these never became the property of the United States by virtue of the treaty; and if there was any doubt about this I do not think the Government can rightfully claim the structures in question, in view of the circumstances under which the treaty was executed and the purchase made by Hutchinson, Kohl & Co.

But though the ownership of the buildings in dispute was left by the provisions of the treaty in the Russian-American Company, yet as all right or interest which the Company had in the land on which they were erected was extinguished and the title thereto transferred, free and unincumbered, to the United States, the Company could not by reason of its ownership of those buildings thereafter occupy such land except by the sufferance of the Government of the United States, and the parties who may have since purchased the buildings from the Company would seem to stand in the same situation relatively to the Government. They are simply occupants of the public domain without title, and where there is no law providing for the acquisition of title from the United States.

"The papers received with your communication are herewith returned.

"I have the honor to be, very respectfully,

"GEO. H. WILLIAMS.

"Hon. WM. A. RICHARDSON,
"*Secretary of the Treasury.*"

The Court of Claims thinks (p. 20) that this opinion "cited by the claimants, can hardly be said to sustain their contention." Suppose the claimants were no more than "occupants of the public domain without title, and where there is no law providing for the acquisition of title from the United States." Were they for that reason wholly without rights in the matter? Certainly the Attorney-General does not so treat them. But this point has already been fully treated in this brief, and need not be here further considered. We shall here only add some further arguments in support of the views of Attorney-General Williams, as to the conclusiveness of the action of the commissioners of the respective governments.

It may be laid down as a general rule, covered by repeated adjudications of this court, that whenever an officer or tribunal is clothed by statute, regulation, or contract with power to ascertain certain facts, or adjudicate questions of law, or, as most frequently happens, where the matters to be decided are of a mixed character, involving both law and fact, the decision of such officer or tribunal is absolutely final and conclusive on both the citizen and the government.

As to stipulations in government contracts, this has been so held in *United States* v. *Shrewsbury*, 23 Wallace, 508, and *Kihlberg* v. *United States*, 97 U. S. 398. In both these cases the contracts sued upon had provided for the arbitration of certain questions arising under them by designated persons, and it was held that where those arbi-

trators had decided upon the matters submitted to them the parties could not be permitted in a subsequent suit to re-open the questions thus decided.

The same has been held as to the Commissioner of Internal Revenue, wherever the law confers upon him the powers of a special statutory tribunal. *United States* v. *Kaufman*, 96 U. S. 567. The same is true in regard to the appraisement of merchandise by officers of the customs, which is to be held to be conclusive on the importer. *Belcher* v. *Linn*, 24 Howard, 508; *Hilton* v. *Merrit*, 110 U. S. 97.

And a long line of cases in this court, extending from *Commissioners of Knox County* v. *Aspinwall*, 21 Howard, 539, down to *Livingston County* v. *Portsmouth Bank*, 128 U. S. 102, have established the proposition that wherever a statute requires that before county or township bonds are issued a vote shall be taken, or some other act done, and certain officers are designated by law to ascertain whether such vote has been taken, or such other act done, the certificate of those officers to the fact is conclusive, and not open to be questioned or impeached in a suit on the bonds.

Well, indeed, may Attorney-General Williams say that "as against the claim of a private party, acts under similar circumstances would amount to an equitable estoppel." And it has been judicially determined that such estoppels operate as conclusively against the Government as they do against individuals. *United States* v. *Nourse*, 9 Pet. 8; *United States* v. *Hill*, 120 U. S. 169.

Not only was the action of the two governments, by their respective agents, a determination of all questions as to whether the acts performed were in compliance with their instructions, but it was final and conclusive touching all matters coming within the scope of their agency, aside from the fact of a direct subsequent ratification.

Hence, all the property turned over and received or reserved takes its status therefrom, and the legality or propriety of the Commissioners' discrimination or discretion is not to be questioned.

"The acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facie* taken to be within his power." The principles on which this point rests "are believed to be too deeply founded in law and reason ever to be successfully assailed. He who would controvert a grant executed by the lawful authority, with all the solemnities required by law, takes upon himself the burden of showing that the officer has transcended the power conferred upon him, or that the transaction is tainted with fraud." *United States* v. *Clarke*, 8 Pet. 436, 452, 453; *Delassus* v. *United States*, 9 Pet. 117, 134; *Mitchel* v. *United States*, 9 Pet. 734, 735.

The force of this argument, which was found so conclusive by Attorney-General Williams, is attempted to be evaded by the Court of Claims by the fact that the commissioners were to make a merely "symbolical delivery"; that in fact they decided nothing as to the buildings in question; and that the President's approval of General Rousseau's services was a mere "complimentary acknowledgment."

We have already argued that the action of the commissioners was an attempt to exercise, so far as they could, the powers conferred upon them by the treaty, and their respective commissions from the two governments, as to the character of the property which passed under the treaty. That their action was so understood at the time is clear from the statement of General Jefferson C. Davis, the officer whose action in seizing this building constitutes one ground of complaint in this case, who, in an official report already quoted, dated November 12, 1867, says (H. R. Ex. Doc. No. 177, 40th Congress, 2d Session,

page 108): "Next came the business of designating the property which should be turned over with the territory. On the morning of the 20th a number of buildings of different kinds were pointed out by the commissioner as United States property, and on the morning of the 21st we commenced landing our stores. * * * The commissioners turned over to us some eleven or twelve buildings in all; several of them were only sheds which could be made useful only for temporary shelter for stores. I think many more houses should have been considered United States property, but *it was the business of the commissioners to decide these questions*, not mine." This certainly shows how the transaction was regarded at the time.

The views of the Court of Claims (pp. 20, 21) as to the delivery being merely "symbolical," and the President's acknowledgment "complimentary," may be safely left almost without comment. Such a construction makes the action of the two governments so trifling as to be unworthy of great powers. The instructions of the President to General Rousseau refer to the matter as "the important business hereby entrusted to you," and the letter of thanks refers to "your important and delicate trust." (Record, pp. 6, 7.) A "symbolical transfer" and a "complimentary acknowledgment" could neither of them be regarded as matters of any special importance or delicacy.

4. The Effect of the Protocol to the Treaty.

When the treaty made March 30, 1867, between the United States and Russia was proclaimed by the United States on June 20, 1867, the President declared "that the same was made public to the end that the same, and every article and clause thereof, might be observed and fulfilled in good faith by the United States and the citi-

zens thereof" (15 U. S. Stats. 543). And on Sept. 11, 1867, Mr. Seward wrote the Russian Minister, Mr. Edward De Stoeckl, who negotiated with Mr. Seward said treaty, to assure the Russian authorities at St. Petersburg, that the United States would not "fail to fulfil the stipulations contained in the Russian American treaty to the letter as well as in spirit" (H. R. Ex. Doc. 177, 40th Cong. 2d Sess. p. 21).

Article 4 of said treaty in effect created a mixed American and Russian Commission to be composed of Commissioners to be appointed respectively by the United States and Russia for its due execution so far as related to the transfer and delivery of possession (15 U. S. Stats. 543).

Said commissioners were duly appointed, to wit: Lovell H. Rousseau, Major-General United States Army, as the American Commissioner, and Alexis Pestchouroff, Captain of the Russian Navy, as the Russian Commissioner, aided by the Russian Prince Dmitry Maksoutoff, Governor of Alaska.

On August 7, 1867,—less than sixty days after said proclamation of said treaty—the President of the United States, through the Secretary of State, Hon. William H. Seward, the plenipotentiary who negotiated said treaty on the part of the United States, being of opinion with the Russian Government that there were certain diplomatic and political acts to be officially done by and through said commissioners in the due execution of said treaty, issued a letter of instructions to the said American commissioner, as recited on pages 5–7 of the Transcript of the Record in this cause. And on August 13, 1867, similar instructions were duly issued to the Russian commissioner by the Russian Government (House Ex. Doc. No. 177, 40th Congress, 2d Session).

The President of the United States being the constitu-

tional executor of the laws (and this treaty and the laws of nations forming a part of said laws) as such executor had a right to judge for himself as to the meaning of said treaty, and what was contemplated to be done by him thereunder, a meaning which in this case could not possibly be misunderstood by himself or Mr. Seward or Mr. De Stoeckl, by whom said treaty had been originally promoted and finally negotiated.

Among other acts, which in the opinion of the President and Secretary of State of the United States and the Russian Government were to be duly performed by said commissioners, was to *distinguish* between that property in Alaska which was to be by them duly transferred and delivered to the United States, and that property therein which was not to be so transferred or delivered, but which was to be transferred, held or retained by those contemplated by said treaty, or provided for in said instructions.

The power granted by the treaty to the Commission was a power which involved the exercise by the said commissioners of discretion and judgment. What was meant by this official action on the part of said commissioners of "*distinguishing*" between the several classes of property named in the treaty and instructions, except that by such means and proceedings as they might determine, and by such evidence as they might deem appropriate and sufficient, they should ascertain, judge and settle what property *was* public and as such to be by them duly transferred and delivered to the United States, and *per contra* what property was not public, and was not to be by them transferred or delivered to the United States?

In addition thereto said commissioners were to draw up and sign in duplicate full "*inventories*" of said classes of property respectively.

What was meant by this act of said commissioners of

drawing up and signing in duplicate full inventories of said properties except they should in inventory form describe, define, enter up, record and certify their findings as to said properties, keeping separate, distinct and apart the different classes of property, and scheduling in one and the same inventory the same class of property?

Inventory "A" was the original record of the findings of said commissioners describing all property which in their judgment was to be delivered and transferred, and which was officially delivered and transferred by them to the United States under said treaty and instructions.

Inventory "B" was the original record of the findings of said commissioners describing all property which in their judgment was not to be delivered and transferred to the United States, but which was to be and was officially transferred and delivered by them to the Greek Oriental Church under said treaty and instructions.

Inventory "C" was the original record of the findings of said commissioners describing all property which in their judgment was not to be delivered and transferred to the United States, but which was to be and was officially delivered and transferred to those who were declared by them to be the owners in fee of the properties therein described.

Inventory "D" was the original record of the findings of said commissioners describing all property which in their judgment was not to be transferred and delivered to the United States, but which was to be and was officially delivered by them to those recognized or declared by them to be the owners of the buildings, and houses built and situate on ground whereof the fee simple was not held by such owners. In this inventory was duly recorded the finding of the commissioners relating to this building owned by these appellants, as stated in the findings of the Court of Claims.

Inventory E related exclusively to the island of Kodiak. (For the inventories in full, see H. R. Ex. Doc. No. 125, 40th Cong. 2d sess. pp. 9–14).

In addition thereto said commissioners made a map in duplicate, upon which they duly delineated every house and lot described in said inventories, and consecutively numbered the same in order as they recited "to be accurate, and to prevent dispute about the title to said houses and lots," etc. (page 8 of the Transcript of the Record).

Five inventories were thus drawn up, signed and certified in duplicate by said commissioners, Rousseau, Pestchouroff and Maksoutoff, and attached to and made parts of their joint reports to their respective governments, one original of each of which, and of said map were duly submitted by the American commissioner to Mr. Secretary Seward, who laid the same before the President, who, in turn, expressed his approval of all of said proceedings, as recited in the letter of Mr. Seward to said commissioner on January 24, 1868 (page 7 of the Transcript of Record).

These proceedings of said commissioners having been thus publicly performed and officially approved, it was the duty of all the departments of the United States to give full effect to the letter and spirt thereof without objection, evasion, or delay.

It is respectfully submitted that it was never intended or contemplated by Congress that the special act of January 17, 1887, should supersede this treaty with Russia, or any part thereof, either directly or by implication.

It is further respectfully submitted that it was not competent for Congress to relegate to the Court of Claims, a municipal tribunal of its own exclusive creation, the readjudication of a matter of a diplomatic and political character, as this, which had been, theretofore, duly submitted

to said Commission by Russia and the United States to officially inquire into, ascertain, determine and report upon to their respective governments.

Congress, when it referred this cause to the Court of Claims to hear and determine, accepted and adopted the findings of said Commission as to this building and the ownership thereof.

The proceedings of the said Commission, acting thereunder, to the expressed satisfaction of the President of the United States by virtue of being diplomatic and political or executive were not a fit or proper subject of reference by Congress to the Court of Claims for review, re-trial or disturbance.

The acts of said Commission related to matters submitted to its exclusive determination, and when by it performed, without fraud or unfairness, and within the scope of the authority conferred upon it by Russia and the United States, were conclusive and final.

Congress was therefore constitutionally powerless to authorize the Court of Claims to re-try or re-determine any of the matters decided by the said Commission.

The Court of Claims not having adopted the findings of said Commission in this cause and not having given thereto the effect required by the treaty, but having ignored the same, its judgment adverse thereto was erroneous. It ought therefore to be reversed, and the cause remanded with directions to set the same aside and to give full effect to the remedial statute for the relief and benefit of the appellants, in the spirit of its enactment.

To ignore the vested rights and claims of these appellants and sustain and affirm the action of the Court of Claims herein, would be not only to ignore in toto and nullify the object and intention of Congress herein, but would in effect be to ignore all other findings of said Commission, and set in motion endless litigation, to dis-

turb titles and destroy value of all properties in Alaska now held by the inhabitants thereof under the protection of said treaty and under the terms recited by said Commission in said inventories; to do which would be violative of that good faith which was mutually expected, contemplated, and relied upon by Russia and the United States, and which on the part of the United States was implicitly assured and fully guaranteed.

No new doctrine is contended for or suggested by these propositions. On the contrary, we insist that they are in harmony with the views of Attorney-General Cushing on November 25, 1855, in a matter arising between the United States and Mexico (7 Opinions U. S. Att'y-Gen. 599), and with those announced by this court in a long and unbroken line of decisions, covering a period of nearly three-quarters of a century.

The appellants maintain that the judicial powers and the political or diplomatic powers of the Government of the United States must be constantly kept distinct, separate and apart, the one not to be permitted to encroach upon the other.

When the political department of the United States has decided and settled a *non-judicial* matter in a given way the judiciary is bound by and should follow such action.

The decisions of international mixed commissions and the findings of international boards of inquiry rendered within the scope of their authority are conclusive and final.

Among the numerous authorities in support of this contention and of the legal principles involved in these propositions we cite the following: *Comegys* v. *Vasse*, 1 Peters, 212; *Foster* v. *Neilson*, 2 Peters, 253; *United States* v. *Percheman*, 7 Peters, 51; *Garcia* v. *Lee*, 12 Peters, 511; *Rhode Island* v. *Massachusetts*, 12 Peters, 714; *Williams* v.

Suffolk Ins. Co. 13 Peters, 420; *Luther* v. *Borden*, 7 Howard, 1; *Kennet* v. *Chambers*, 7 Howard, 38; *Kennet* v. *Chamberlain*, 14 Howard, 38; *Judson* v. *Corcoran*, 17 Howard, 612; *The Exchange* v. *McFadden*, 7 Cranch, 116; *Den* v. *Hoboken Land Imp. Co.* 18 Howard, 285; *Nabob of the Carnatic* v. *East India Co.* 2 Vesey, Jr. 60; *Gordon* v. *United States*, 2 Wallace, 561; *State of Georgia* v. *Stanton*, 6 Wallace, 56; *White* v. *Hart*, 13 Wallace, 649; *Phillips* v. *Payne*, 92 U. S. 132; *Throckmorton* v. *United States*, 98 U. S. 61; *Marquez* v. *Frisbie*, 101 U. S. 477; *United States* v. *Lee*, 106 U. S. 209; *Frelinghusen* v. *Key*, 110 U. S. 70; *Moffatt* v. *United States*, 112 U. S. 32; *Minor* v. *United States*, 114 U. S. 233; 1 Kent (Comstock's Ed.), 170; Vattel, B. 2, C. 12, Secs. 196, 197; Vattel, B. 4, C. 2, Secs. 14, 18; Lawrence's Wheaton, 49, 471.

5. Conclusion.

In conclusion it may be stated that the findings of fact made by the Court of Claims are in many particulars unsatisfactory to the claimants, and in their opinion not justified by the evidence, as they are certainly in conflict with the recitals of the preamble of the special act. Were it not for the repeated decisions of this court declining to review questions of fact on appeal from the Court of Claims, we should ask a reversal on errors of fact as well as of law. As it is, we are compelled to argue the case, as we confidently do, upon the ground that the conclusions of law of the Court of Claims are not justified by its findings of fact.

This condition of the findings of fact is here adverted to only in order that in case of a reversal of the judgment the order of this court remanding the case may not be framed in such a way as to cut off the claimants from rearguing questions of fact before the Court of Claims.

The judgment should be reversed, and the cause remanded to the Court of Claims with directions to rehear the case and award to the claimants the "fair and reasonable rent" and the "suitable indemnity" for the building taken, as required by the terms of the special act giving the Court jurisdiction of the claim.

JOHN MULLAN,
GEORGE A. KING,
JOSEPH K. MCCAMMON,
Attorneys and of Counsel for Appellants.

49TH CONGRESS, 1st Session. HOUSE OF REPRESENTATIVES. REPORT No. 3030.

JOHN H. KINKEAD, SAMUEL SUSSMAN, AND CHARLES O. WOOD.

JUNE 22, 1886.—Committed to the Committee of the Whole House and ordered to be printed.

Mr. MCKENNA, from the Committee on Claims, submitted the following

REPORT:

[To accompany bill S. 1353.]

Senate bill No. 1353 and House bill No. 1452, referring to the Court of Claims for adjudication the claims of John H. Kinkead, Samuel Sussman, and Charles O. Wood, have been referred to the Committee on Claims, who, having considered the same, recommend that the House bill lie on the table and that the Senate bill pass.

The committee adopt the Senate report which is hereto attached.

[Senate Report No. 208, Forty-ninth Congress, first session.]

The Committee on Claims, to whom was referred the bill (S. 1353) referring to the Court of Claims for adjudication the claims of John H. Kinkead, Samuel Sussman, and Charles O. Wood, having had the same under consideration, submit the following report:

These claims were under consideration in the Forty-eighth Congress, and on the 19th of May a report was made by this committee, through Senator Fair, then a member of the committee, as follows:

This bill concerns two separate claims of similar character—that of John H. Kinkead and Samuel Sussman, and that of Charles O. Wood. Both claims are for the rent and value of certain buildings in Sitka, Alaska. The facts in relation to the matter are as follows:

By the treaty of March 30, 1867, between the United States and Russia (Public Treaties of the United States, p. 671), providing for the cession of Alaska, provision was made for the cession of—

"All public buildings, fortifications, barracks, and other edifices which are not private individual property." (Article 2, p. 672.)

And by Article 4 of the same treaty, p. 673:

"His Majesty, the Emperor of all the Russias, shall appoint, with convenient dispatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, dependencies, and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto."

The agents provided for by this article performed their duty, and their report is contained in House Ex. Doc. No. 125, Fortieth Congress, second session. These agents of the two Governments carefully inventoried all the buildings in the Territory, and made separate inventories of the public property in the town of Sitka, the property of the Græco-Russian Church in Sitka, and the private property in Sitka. In the last-named list were included the warehouse numbered as building No. 1 of that town and the dwelling-house known as No. 24. These buildings were the private property of the Russian-American Company, a trading corporation having extensive privileges

in that Territory, and vested also with certain rights of government. The buildings used for public and governmental purposes by this company were doubtless included within the words of the treaty providing for the cession of all such public property. Buildings, however, used by them for private trading purposes were private property, which, under the terms of the treaty and by every principle of public law known to your committee, were not forfeited or transferred by the treaty, but remained vested in their original owners without change of proprietorship by the treaty. The agents appointed to deliver on the one hand and receive on the other the public property evidently took this view of the matter, and, as we have stated, separated the public and the private property.

Their decision on the question of what was public and what private property is, in the opinion of your committee, conclusive, and not subject to review before any other authority or tribunal. When, therefore, they found and declared, as they did, that these buildings, Nos. 1 and 24, were private individual property, that decision must be accepted as conclusive of the question. Relying upon this decision, the claimants, Kinkead and Sussman, purchased from the Russian-American Company, acting through their chief administrator, Prince Duritry Maksontoff, the warehouse No. 1, just mentioned. The deed was taken in the name of Louis Sloss, but Mr. Sloss, in his testimony before the Court of Claims, expressly disclaims all ownership in the building; and it fully appears that the title was taken in his name for purposes of business convenience, and that the money was paid by Messrs. Kinkead & Sussman, and that they exercised over it every substantial right of ownership. They subsequently leased a portion of the building to Hiram Ketchum, jr., collector of customs at the port of Sitka, for a custom-house, at the rate of $200 per month, which is shown by the evidence to have been a reasonable rent, the building being a large one, the necessities of the Government for such a building imperative, and the demand for buildings in Sitka at that time far in excess of the supply.

By this time, however, the theory seems to have been started in some of the Departments at Washington that this building was public property and should be claimed as such; and when the lease which had been taken by the collector of customs under the provisions of the act of March 2, 1799 (§ 21, 1 Stat. L., p. 642), was submitted to the Secretary of the Treasury for his approval, he declined to approve it. Instead, however, of directing that the building should be vacated and possession restored to the owners, which would seem to have been the only equitable disposition of the matter after they had surrendered possession on the faith of their lease to the United States, he directed the collector to continue in possession, and to hold the part of the building which he occupied as public property. A short time afterwards General Jefferson C. Davis, then in command of the Department of Alaska, seized all the remaining part of the warehouse in question not already occupied for a custom-house, and turned the same to military purposes, and it has ever since been occupied substantially in that manner. It has never been returned to the owners, nor has any rent ever been paid for its occupancy.

The case of Charles O. Wood is precisely the same as that of Kinkead and Sussman, with the exception that no part of his building was ever leased to the customs department. He purchased the building from the Russian-American Company through Prince Maksontoff, paid for it, and received a deed in his own name, and the whole building was subsequently seized from him by General Davis. The parties subsequently brought suit in the Court of Claims to recover rent as on an implied contract. Full proof was there made of all the facts above stated, and the amount of reasonable rent for the buildings was shown to be stated in the bill now reported. The court, however, held that the case was not within their jurisdiction, as being founded on a tort rather than on an implied contract, and that for that reason they had no jurisdiction of the case. They further held that jurisdiction was denied to them by section 1066 of the Revised Statutes, declaring that the jurisdictian of that court "shall not extend to any claim against the Government * * * depending on any treaty stipulations entered into with foreign nations."

Without questioning the correctness of the position thus taken by the Court of Claims as to its jurisdiction, it seems sufficient to us to say that the evidence taken by the claimants in their cases in that court, findings of fact made by the Court of Claims, and the report of the agent of the United States appointed to receive the cession of Alaska, contained in House Ex. Doc. No. 125, Fortieth Congress, second session, above referred to, fully established the title of the claimants to the property in question, and the amount of rent which they ought to receive for the use of their buildings. As the Government is now in the occupancy of these buildings, and needs them for public purposes, it is provided in the bill that the reasonable value of the buildings shall be paid to the claimants upon their executing a release to the United States of all right, title, and interest in and to the property.

We may mention further in support of our views, that they are the same as those taken by the Attorney-General of the United States in a learned opinion dated Sep-

tember 27, 1873, and reported in the 14th Opinions of the Attorney-General, p. 302, in which he held that the buildings inventoried as private property in the protocol of transfer of Russia to the United States, to which we have above alluded, and among which are the buildings Nos. 1 and 24, above mentioned, remained the private property of that company after the cession, and were capable of being transferred by it like other private property.

Your committee, concurring in these views, and being satisfied, after a careful examination, of the justice of these claims, report back the bill favorably, with an amendment in the form of a substitute.

Your committee concur in the findings of fact and recommendation of that report, and report back the accompanying bill as a substitute for Senate bill 1353, and recommend its passage.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

JOHN H. KINKEAD AND SAMUEL SUSSMAN, appellants,
v.
THE UNITED STATES.
No. 83.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

By the treaty proclaimed June 20, 1867 (15 Stat. at L., 539), the Emperor of Russia ceded the province of Alăska to the United States. The first article of the treaty makes cession of "all the territory and dominion now possessed by his said majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit:" (Boundaries.)

Article 2 provides, that in the "cession of the territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property."

Article 4 provides for the appointment of an agent of each government, for the purpose of making and receiving formal delivery, and closes as follows:

> But the cession with the right of immediate possession is nevertheless to be deemed complete and absolute on the exchange of ratifications without waiting for such formal delivery.

Article 6 provides:

> The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders.

It appears that the territory thus ceded had been principally occupied prior to this treaty by a Russian corporation known as the Russian-American Company, which company had the privilege of entering upon and using the public lands and erecting structures thereon, but with no right or privilege of becoming the owner of any such lands, but did have the privilege of conveying parcels of it in fee simple, to its employés, occupants of the land in the territory, and that the company acting under the latter right, had in many cases vested in the employés the lands upon which had been constructed the dwellings erected by the company and occupied by its employés, or their widows and children. This charter had expired in 1862, and though negotiations were pending therefor, had not been renewed at the time of the cession.

After the ratification and proclamation of this treaty to wit, on the 7th of August, 1867, Brig. Gen. Lovell H. Rousseau was appointed agent of the United States, to receive formal delivery of the ceded property and territory, from a similar agent to be appointed by the Emperor, with instructions to respect the rights of private individuals in the ownership of their dwellings and other buildings, and to distinguish between the property to be transferred to the United States and that to be retained by the individuals, and to draw up and sign full inventories of the same in duplicate, and to furnish to the individual proprietors certificates of their ownership upon production of proper documentary or other proof of ownership. (R., p. 6.)

Pursuant to these instructions, Gen. Rousseau proceeded to Alaska, received transfers of property, the two agents signing a protocol of date October 26, 1867, in which, *inter alia*, they certified to the delivery of Government archives and Government buildings described in the inventory attached, marked A, the giving of certificates of ownership to individual owners of private houses and of lands in fee simple, a list of whose names was presented in the inventory thereto attached, marked C, and that in the inventory marked D, were shown the houses and buildings owned by private individuals in New Archangel (in Sitka), the owners thereto having no title in fee to the lands upon which they are situated, this inventory containing only descriptions of buildings without names of owners.

In the last of these inventories was included a log building described as a warehouse, 118 feet in length, and

50 feet in width, erected in 1845 by the Russian American Company, at their own expense, and from that time to the date of the treaty used by said company as a warehouse for storage of furs and other property for trading purposes, the land upon which such building stood having belonged to Russia was embraced in the cession to the United States.

On the 29th day of October, 1868, one year later, a deed was executed by P. Maksoutoff, describing himself as chief administrator of the Russian American Company, and authenticated by the seal of that company, wherein the Russian American Company, party of the first part, for and in consideration of $3,000 gold coin, to them paid by Louis Sloss, of San Francisco, party of the second part, conveyed by full and apt words of conveyance to said Louis Sloss, and his heirs forever "all that certain piece or parcel of land situate, lying and being in the city of Sitka and Territory aforesaid, and more particularly described as that piece or parcel of land situate near and adjoining to the public wharf of said city upon which is erected building number one, and described as a warehouse in the map and inventory D, attached to and made a part of the protocol of the transfer of said territory to the United States by Russia, and therein declared to be private property, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any way appertaining, and the reversion and reversions, remainder, and remainders, rents, issues, and profits thereof. And also all the estate, right, title, interest, property, possession, claim, and demand whatso-

ever, as well in law as in equity, of the said party of the first part of, in or to the said premises and every part and parcel thereof, with the appurtenances." (R. p. 11.) Which deed contained a warranty against acts of the party of the first part and those claiming under it.

On the 25th day of February, 1887, Louis Sloss executed a written instrument reciting the above-mentioned deed, and the payment of the consideration therein mentioned by the two claimants in this action, and that the claimants were the true parties in beneficial interest, and that the said Sloss took the title merely for convenience and business accommodation between the parties and not otherwise, and held it merely as trustee for the claimants, and in consideration of the premises and $1, conveyed the same real estate to these claimants, and by the same description as in the foregoing deed to him, including in such transfer in addition to the real estate, "all rents, past, present, or prospective, and issues and profits thereof, or due in any manner and whencesoever arising." (R., pp. 12, 13.)

After possession of Alaska Territory by the United States, William S. Dodge, was appointed collector of customs, and he and his successors thenceforward to the second of June, 1869, occupied as such collectors, a part of the building in question as a customs warehouse, during which period another portion of the building was in the occupancy of the claimant Sussman.

On June 2, 1869, Gen. Jefferson C. Davis, then in command of the Department of Alaska, under instructions from the War Department, took possession of the

entire building, and from thenceforward, it has been used and occupied by the representatives of the United States Government (R., p. 10).

At the time of such seizure by Gen. Davis the claimant Kinkead, styling himself attorney for the owners of the property, claimed ownership for his principal by virtue of the deed from the Russian-American Company to Sloss above referred to.

Some time between July and December, 1868, the claimant Sussman, as agent for Sloss, objected to the Government occupying the warehouse and demanded either delivery of possession or the acceptance of a lease, whereupon the then collector, Ketchum, entered into a lease for a portion of said warehouse, to run from the 15th day of December, 1868, to the 15th day of December, 1869, at the monthly rental of $200, containing an option or privilege for the United States to purchase said building during the term of the lease for $22,500. That lease ran to Ketchum personally, and not by his official title. (R., pp. 13, 14.) That lease upon transmission to the Secretary of the Treasury was disapproved and reference made to a letter of February 6, 1869, from the Secretary of the Treasury, wherein the claim was made that the building was the property of the United States under the treaty of cession.

The case was referred to the Court of Claims by act of Congress approved January 17, 1887 (24 Stat. at L., p. 358), wherein it was provided—

> If said court shall find that said parties acquired a valid title to said buildings, respectfully, alleged to have been purchased by them, said court shall award to said parties a fair and reasonable rent for the use

of the said buildings for the time (if any) the same have been occupied by the United States, and also a suitable indemnity for said buildings themselves.

Two questions naturally present themselves upon this state of facts, both of which must be answered favorably to the claimants, in order that they should have brought themselves within the provisions of the act of Congress. First, did this building pass to and become the property of the United States by the treaty of June 20, 1867; secondly, if it did not, did the claimants acquire title to it?

I.

A permanent building erected upon lands of another as a general proposition of law becomes affixed to and a part of the realty, has none of the characteristics of a chattel, but is real estate, part of the land, and belongs to the owner of the latter. Its identity as anything except a portion of the realty is gone—

Madigan v. *McCarthy*, 108 Mass., 374.
Sudbury v. *Jones*, 8 Cush., 184.
Poor v. *Oakum*, 104 Mass., 309.

The building in question was a permanent structure 118 by 50 feet, constructed of heavy hewn logs; had been in place more than twenty years, and was incapable of removal as a building, and its removal could never have been contemplated, for the builders had no other land to which it could be moved and under their charter could acquire none.

This building, then, became realty; it was a part of the ground on which it stood, and belonged to whomever was the owner of the ground unless some agreement is shown

to prevent that conclusion; something affirmative which preserved to the builder a *chattel* right in the building.

The record is absolutely devoid of any proof of any such agreement or relation. The claimant has offered no proof of the rights of the company which erected this building, and the findings only disclose that the land on which it stood belonged to Russia and was embraced in the cession to the United States; that the building was of massive and permanent character and large size, such as to preclude any idea of removal from its location; and that the company had, prior to treaty, only a possessory interest in the land as it only had *permission* to erect buildings upon it. The charter under which the company had operated was last renewed in 1844 and accorded the company exclusive rights to carry on the fur and fishing trades; to hold and use all things found on or under the surface of the earth, and to establish and improve settlements and fortifications, and to send to these regions vessels and laborers. The term of the charter was limited to twenty years from January 1, 1842. It is entirely silent as to any rights to remove any structures erected, and makes absolutely no distinction between fortifications and any other structures or buildings, except, of course, those of the private individual employés of the company to whom ownership of land in fee might be granted by virtue of acts referred to in appellant's brief. These are absolutely all the facts bearing upon the title or ownership of this building, and they are wholly inadequate, indeed are, without tendency to limit or defeat the legal effect of the act of construction of a permanent building by one person on the land of another.

We may safely start, then, with the proposition that this building, being a part of the land on which it stood *belonged* to Russia, the only right of the Russian American Company being a mere license or privilege to possess or occupy this land and the building as part of the land, as also all other lands at Sitka. A license or privilege wholly expired and subject to the will of the Russian Government.

The next question arising is whether Russia, in ceding to the United States the land to which the building was affixed and of which it was a part, withheld from the grantee either the ownership of or any rights in this building.

The question must be answered by an examination of the treaty of June 20, 1867, for whatever at any time passed from one nation to the other passed upon the ratification of that treaty, and was neither enlarged nor diminished thereafter. (See article 4 as above quoted.) By that treaty was passed all territory and dominion possessed by the Emperor, within certain geographical boundaries (article 1) including all other edifices which are not private individual property (article 2) all declared to be "free and unencumbered by any reservations, privileges, franchises, grants, or possessions by any *associated companies*, whether corporate or incorporate, Russian, or any other, or by any parties except merely *private individual* property-holders.

Language is incapable of more carefully guarding the United States against any limitation upon the absoluteness of the title it was buying to all the territory included in the cession except only for the rights of *private indi-*

viduals, owning real estate, of whom there were several, or of evincing the intention to distinguish those *private individuals* from *associated companies*.

Doubtless the generic term, person or individual, may in some cases and contexts include corporations, but it seems needless to argue that in a paragraph which in terms places "associated companies" on one side of a line and "private individuals" on the other, the latter expression is not intended to include the former. Of course the meaning conferred on the words "private individual" by their antithesis with "associated companies" in the 6th section characterizes their use in the 2d section of the treaty.

This treaty clearly, even laboriously, cedes to the United States all real-estate rights, privileges, and possessions held by associated companies, and just as clearly withholds the rights of private individuals (as distinguished therefrom), who own real estate. The expression, private individual property holders, a most unusual and striking formula in treaties, is tautological, and either the word private or the word individual is meaningless and redundant if used in a sense to include this great corporation. Private property might include corporate property but for the context, but the word individual adds nothing to its force unless intended, as we claim, to exclude the corporation. If we bear also in mind the fact that this corporation was not only a trading corporation but that to it were delegated all governmental powers within this Territory, and that it was not only a corporation but in a sense a public corporation, the antithesis marked by the words private individual property holders is all the more emphatic.

The effort of appellant to argue that corporate property is in fact the property of the individual stockholders is best answered in the language of Mr. Justice Gray in *Gibbons* v. *Mahon* (136 U. S.,.549–557): "The ownership of that property is in the corporation, and not in the holders of its stock."

The purpose that this treaty should convey to the United States the rights of this corporation in real property, and that the duty of satisfying any claims to compensation which that company might have should be assumed by Russia, is further evinced by the correspondence quoted in the opinion of the Court of Claims (R., p. 19), wherefrom it appears that Secretary Seward insisted upon it, and that the United States paid $200,000 additional upon that consideration.

The conclusion that this building became the property of the United States was contested in the court below upon several grounds:

(1) That Congress has by the act referring this cause to the Court of Claims legislated in advance both that this building belonged to the Russian-American Company and that claimants had purchased it. Of course, if this construction can be placed upon the act of Congress, it is conclusive of this appeal, for in that case the only question submitted to the court would be the amount to be paid, which question has not been considered.

The act of Congress (24 Stat. L., p. 358), found at page 2 of record, commences with a series of recitations, the first of which is as follows:

> Whereas John H. Kinkead, of Nevada, and Samuel Sussman, of California, did, on the twenty-eighth

> day of October, eighteen hundred and sixty-eight, purchase a certain building situate on lot known as number one on the official plat of the town of Sitka, in the Territory of Alaska, from the Russian American Company, the owner of said building;

following which, among several others, is a nearly similar recitation to the effect that one Charles O. Wood purchased a certain other building, etc., and a recitation that these claims, having been theretofore presented to the Court of Claims, had been dismissed "for want of *jurisdiction* only."

The act then proceeds—

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction be, and is hereby, conferred on the Court of Claims to hear the claims of John H. Kinkead, and Samuel Sussman and Charles O. Wood, for the rent and value of certain buildings in the town of Sitka, in the Territory of Alaska, alleged by them to have been acquired by virtue of purchase from the Russian American Company, upon the evidence already filed in said court and such additional legal evidence as may be hereafter presented on either side; and if said court shall find that said parties acquired a valid title to said buildings, respectively, alleged to have been purchased by them, said court shall award to said parties a fair and reasonable rent for the use of the said buildings for the time (if any) the same have been occupied by the United States, and also a suitable indemnity for said buildings themselves; and the receipt of such rent and indemnity shall thereafter bar any further claim by said parties for the use of said buildings or

> for the value thereof; and before receiving the same, all of said parties shall execute a release to the United States for all right, title, and interest whatsoever in and to the said property; and any defense, set-off, or counter claim may be pleaded by the United States as defendants, as in cases within the genral jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

We must ascertain from this act what Congress in fact meant. Whether, as claimants contend, the intention was merely to submit the question of what amount of rent and indemnity should be paid by the Government for a building, legislatively decided to be theirs and to have been taken from them, or to submit the whole case for the court to try the validity of claimants' title; and, if that be found valid, then the question of amount of compensation.

If the recitations of the act are to be deemed legislative decisions of all the facts recited and conclusive thereof upon the court, nothing is left for the court save the one question of amount.

Congress clearly had no such intention. Jurisdiction is conferred "to hear the claim * * * and if said court shall find that claimants acquired a valid title to said building alleged (not legislated) to have been purchased by them" to proceed with the question of amount; concluding with the provision "any defense, set-off, or counter-claim may be pleaded by the United States as defendants as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal in such cases."

If claimants' title was intended to be conclusively and legislatively determined by the act itself, why refer its validity as a question to be investigated and decided by the court?

If claimants' purchase was legislatively determined and withdrawn from the court, why should it be called an *alleged* purchase?

If the Government was to be excluded from making any defense and only to be heard on the question of the amount of rent and indemnity, why provide that all defenses might be interposed?

In brief, the intent of Congress is clear merely to remove the jurisdictional bar which the court had previously enforced, and to put claimants in court for a judicial investigation and decision of all questions of merits which might have arisen had the court originally entertained jurisdiction.

The *Jordan Case* (113 U. S., 418), cited by claimants below, bears no analogy to the question here. In that case was no recitation but a positive provision that the Secretary should pay a *specified sum* in refund of unlawfully-collected taxes, and the court held that neither it nor the Secretary of the Treasury could inquire whether that amount had been unlawfully collected, but that the enacting portion of the act must be obeyed even if it conflicted with the facts recited as the reason for it.

The rule of construction of acts granting rights or relinquishing public interests to individuals or corporations, as frequently announced by this court, is that every reasonable doubt is to be resolved adversely to such grant

or relinquishment. Nothing is to be taken as conceded except what is given by unmistakable terms. This doctrine is vital to the public welfare, and is axiomatic in the jurisprudence of this court.

Newton v. *Commissioners*, 100 U. S., 548, 561.
Fertilizing Co. v. *Hyde Park*, 97 U. S., 659, 666.
Slidell v. *Grandjean*, 111 U. S., 412, 437.

By way of answer to the argument of appellants' counsel for construction of this act, based upon the report of the Senate committee, as appended to their brief, though of at least doubtful propriety under the decisions of this court, we desire to present the facts with reference to the passage of the bill, and to append to our brief the enacting clause of the act as reported back by the committee making the report appended to appellees' brief, together with the amendment thereto made, after said report, upon the floor of the Senate. The portions in italics are the amendments affixed to said bill by the Senate after said report was made, and clearly evince the intention to so change the bill as to relegate to the Court of Claims the investigation of all the facts at all affecting the validity of claimants' title. The proposed bill, as to which was made the report appellants print, was unquestionably intended by the *committee* to withdraw from the court all questions except the proper amount of rent and indemnity. The amendments imposed on the bill after it had been so reported were just as clearly intended by the *Senate* to prevent the act from having such effect.

(2) Claimants further contested the title of the United States on the ground that in all cases of transfer of terri-

tory and dominion from one sovereignty to another, whether by treaty or even by conquest, private property rights are uniformly understood to be preserved to their owners, a proposition freely conceded, subject to the limitation that if the treaty expressly frees the property ceded from any such rights, the ceding sovereignty assuming to cancel them, the treaty must govern rather than the laws of nations or any custom to make different treaty provisions in other cases, and especially where those rights are merely possessory in a quasi public corporation terminable at the will of the sovereign. We are thus brought back to consideration of the terms of the treaty itself, a subject which has been sufficiently discussed above.

(3) The only remaining argument urged by claimants below against the conclusion of the transfer of this building to the United States is to the point that cotemporaneous acts tended to confirm a different construction.

These acts are, first, that Secretary Seward, in his instructions to Gen. Rosseau, did not specifically call attention to the distinction between the Russian-American Company and the private individual owners of buildings, with rights in the realty whereon situated and instructed that certain defined classes of buildings, none of which included this, were to be left subject to the control of their owners and not included in the transfer to the United States.

Secondly. That substantially similar instructions were given to the Russian commissioners appointed to deliver possession, as to which nothing appears in the record, and for the purposes of this appeal is not a fact.

Thirdly. That the commission distinguished this building and a few others from those which were actually taken into the manual possession of the United States, by including it in an inventory, D of the protocol, which they call a list of "houses and buildings owned by private individuals," the owners thereof having no title in fee to the land on which they are situated, and as to which Gen. Rosseau reports (R., p. 8):

> The town of New Archangel was built in the main by the Russian-American Company, and, except the buildings, transferred by them to their employés, and the public buildings transferred to the United States, is owned by that company still; yet it has but a possessory interest in the land, as it only had permission to erect buildings upon it; for, although it had authority to vest the title of lands in its employés, it had no power to vest such title in itself. The commissioners left the matter as they found it and the company in possession of its buildings.

The answer to this contention is that the treaty according to its terms means one thing or the other; it took effect on June 20, 1867, and from that date to October 18 of the same year, the date of formal delivery, the title to this building was either in the United States or it was not. The acts of the commissioners could not change it, and according to General Rosseau's report they made no attempt to do so, for as above quoted he says the commissioners left the matter as they found it and the company in possession of the buildings.

It is further to be observed that this schedule of property left as they found it was as much distinguished from

the property of private individual owners to whom certificates of title were issued, as it was from the governmental and military buildings confessedly transferred.

II.

Our second position is that whatever the effect of the treaty and other transactions in transferring this building to the United States, there is absolutely no fact constituting transfer of it to the claimants.

If this building had as we have argued become realty, affixed and appurtenant to the land on which it stood, there can be no question of its transfer to the United States. The only possible theory on which its continued ownership by the Russian American Company can be sustained is that it continued to maintain a chattel character and could be, by that company, removed, sold, or otherwise disposed of as a chattel.

The land had on June 20, 1867, been transferred to the United States absolutely free from any claim therein or thereto, even possessory, in favor of this company, and if, having clearly no rights in the land, they continued to own the building it must have been as a chattel wholly distinct from the land on which it stood.

Keeping this view in mind we find nothing to transfer ownership from the Russian American Company. All that claimant offers is a plain and simple deed of land (R., p. 11), and that not to these claimants but to Louis Sloss.

If as claimants must contend this building was a chattel, distinct in character and ownership from the land on which it stood, then there are no words in the deed by

which it can be conveyed—or if claimants prefer the other horn of the dilemma and would contend that the words "tenements and appurtenances", in the deed suffice to describe the building they concede our first contention that it is so a part of the realty that the treaty ceded it to the United States.

Neither is there any possession apparent from which transfers to or ownership by the claimants might be inferred. True, it is found by the court that in the latter part of 1868, Sussman, one of the claimants, was in occupation of part of the building, but by his lease dated December 15, 1868, he expressly excludes from his occupancy any claim of ownership, for he makes that deed as agent for Louis Sloss (R., p. 13).

There is no finding that Kinkhead ever was in occupancy or possession. His only appearance in relation to the property being that as "attorney for the owners" he protested against the taking of the property by the United States officer.

The only pretence of conveyance to the claimants is again a deed of the realty only, except that it purports also to convey all rents due for the same. It is wholly insufficient to convey to them a chattel not a part of the land. If of effect or necessary at all to transfer anything, it defeats claimants' rights, for it was not made until more than a month after the passage of the act referring their title to the court.

Respectfully submitted.

J. E. DODGE,
Assistant Attorney-General.

APPENDIX.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That jurisdiction be, and the same is hereby conferred on the Court of Claims to hear the claims of John H. Kinkead and Samuel Sussman and Charles O. Wood *for the rent and value of certain buildings in the town of Sitka, in the Territory of Alaska, alleged by them to have been acquired by virtue of purchase from the Russian American Company,* upon the evidence already filed in said court, and such additional legal evidence as may be hereafter presented on either side; and *if said court shall find that said parties acquired a valid title to said buildings, respectively, alleged to have been purchased by them* said court shall award to said parties a fair and reasonable rent for the use of the said buildings for the time *if any* the same have been occupied by the United States, and also a suitable indemnity for said buildings themselves; and the receipt of such rent and indemnity shall thereafter bar any further claim by said parties for the use of said buildings or for the value thereof; and before receiving the same all of said parties shall execute a release to the United States for all right, title, and interest whatever in and for the said property; and any defense, set-off, or counter claim may be pleaded by the United States as defendants, as in cases within the general jurisdiction of the court, and either party shall have the same right of appeal as in such cases.

The amendment also struck out from the reported bill the following:

Provided, That the liability of the United States shall be the same as if the acts done by the officers of the Government in the premises had been done by the agent of a public corporation.

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